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# Is There a Twenty-Seventh Amendment - The Unconstitutionality of a New 203-Year-Old Amendment, 26 J. Marshall L. Rev. 977 (1993)

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# IS THERE A TWENTY-SEVENTH AMENDMENT? THE UNCONSTITUTIONALITY OF A "NEW" 203-YEAR-OLD AMENDMENT

## INTRODUCTION

At 11:13 a.m. on May 7, 1992,[1] Michigan became the thirty-eighth state[2] to ratify the Twenty-seventh Amendment to the Constitution.[3] After little debate,[4] an election-wary[5] 102d Congress[6]

1. *See* 138 CONG. REC. H3075 (daily ed. May 7, 1992) (statement of Rep. John Boehner of Ohio).

2. *See* 138 CONG. REC. S6845-46 (daily ed. May 19, 1992). New Jersey and Illinois have also ratified the amendment. *Id.* at S6846. On June 26, 1992, California ratified the amendment, bringing the current total to forty-one. RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 246, 370 n.9 (1993).

3. U.S. CONST. amend. XXVII. The amendment provides a restriction on congressional pay raises: "No law, varying the compensation for the services of the senators and representatives, shall take effect, until an election of representatives shall have intervened." *Id. See also* 57 Fed. Reg. 21, 187-88 (1992). The amendment is referred to herein alternatively as the Madison amendment, the pay-raise amendment, and the Twenty-seventh Amendment.

4. *See* 138 CONG. REC. S6950 (daily ed. May 20, 1992) (statement of Sen. William Roth of Delaware) ("The problem is not the policy embodied in the 27th amendment. In fact, part of the problem is that there is no opposition to the policy, so that the Senate has not given this subject the deliberation it so richly deserves."). *See also id.* at S6828-31 (daily ed. May 19, 1992) (statement of Sen. Robert Byrd of West Virginia) (arguing that Congress had not taken sufficient time to "assess its constitutional responsibilities").

5. *See* Jim Hampton, *Mr. Madison, We Thank You*, MIAMI HERALD, May 10, 1992, at 2C ("Congress itself could challenge the amendment's ratification. But in today's mood of public contempt for Congress, it would be rash indeed to step in front of this juggernaut.").

6. The unpopularity of the 102d Congress is well-documented. *See, e.g.*, William L. Renfro, *Constitutional Clamp on Congress' Pay*, CHRISTIAN SCI. MON., Mar. 30, 1992, at 18. Arguing in favor of the pay-raise amendment, the author contended that reform was needed to curb congressional excesses:

> In the past two years, the old guard has given themselves a 47 percent pay raise, taking an additional $20 million each year from taxpayers. They also hiked their pensions by 47 percent, expanding the burden to future taxpayers. In January of this year, the members of Congress were at it again, giving themselves a cost-of-living hike of $2.4 million. Members managed to accomplish this in virtual secrecy, without even having a vote, much less a recorded vote. . . . Considering their $2.4 million and $20 million raises, their $400 billion budget deficit, their 20,000 kited checks, their $647,000 of unpaid lunch bills, the abuse of campaign funds, not to mention the $500 billion bill for the S&L debacle, the opportunity for reform may not be as great as the need for more revolutionary action — such as term limits.

*Id.* By mid-1992, Congress' public approval ratings were at an "all-time low." John R. Vile, *Just Say No to 'Stealth' Amendment*, NAT'L L.J., June 22, 1992, at 15-16.

voted overwhelmingly in favor of adopting the amendment, which restricts Congress from voting themselves an immediate pay raise.[7] The amendment was thus passed into law more than two hundred years after it was originally introduced[8] in the first session of Congress.

Described as "rejected" by historians,[9] and "dead" by legal commentators,[10] James Madison's resurrected pay-raise amendment[11] raises many troubling and uncertain issues regarding the process of amending our Constitution. That process is set forth in the text of Article V of the Constitution, but that provision contains no qualifications as to the time in which an amendment must be ratified.[12] The dilatory ratification[13] of the Twenty-seventh Amendment holds potentially dangerous ramifications as to the future of amendment proposals which were thought to have died long ago.[14]

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7. On May 20, 1992, the House voted 414 to 3 in favor of ratification. H.R. Con. Res. 320, 102d Cong., 1st Sess. (1992); 138 CONG. REC. H3505 (daily ed. May 20, 1992). On the same day, the Senate voted unanimously, 99 to 0, in favor of the amendment. S. Con. Res. 120, 102d Cong., 1st Sess. (1992); S. Res. 298, 102d Cong., 1st Sess. (1992); 138 CONG. REC. S6948 (daily ed. May 20, 1992).

8. 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 338-40 (Lippincott ed., 1881) [hereinafter ELLIOT'S DEBATES]. What is now our 27th Amendment was originally Article II of twelve "Articles in Addition to, and Amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Fifth Article of the original Constitution." *Id.* at 338. These amendments, which are now known as the Bill of Rights, "became a part of the Constitution, the first and second of them excepted, which were not ratified by a sufficient number of the state legislatures." *Id.* at 340.

9. ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 217 (1983). *See also* THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES: AN ANTHOLOGY OF HISTORIC DOCUMENTS AND COMMENTARIES THEREON, EXPOUNDING THE STATE AND FEDERAL RELATIONSHIP 108-15 (1964) [hereinafter VIRGINIA COMMISSION] (stating that the pay-raise amendment and four other "failed" amendments are "incomplete proposals" and that their "existence . . . can be disregarded [because] . . . [t]hey are dead in practice").

10. *See, e.g.*, Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 425 (1983) (indicating that the non-ratified "amendments proposed in 1789 . . . raise no problems: they simply died").

11. Don J. DeBenedictis, *27th Amendment Ratified: Congressional Vote Ends Debate Over 203-Year-Old Pay-Raise Proposal*, 78 A.B.A. J. 26 (1992).

12. U.S. CONST. art. V; see also *infra* notes 17, 72-83 and accompanying text for Article V and discussion of how it has been interpreted with regard to time limitations on amendment.

13. *See* DeBenedictis, *supra* note 11 (summarizing criticism of Congress' late ratification of the Twenty-seventh Amendment).

14. *See* Stephen Chapman, *A New Amendment May Produce Yet Another Surprise*, CHI. TRIB., May 17, 1992, § 4, at 3 (stating that the Twenty-seventh Amendment serves as precedent for reviving the failed Equal Rights Amendment); see also *infra* notes 67-71 and accompanying text concerning these unratified amendments.

The ratification of the Twenty-seventh Amendment has raised many questions and concerns, including: the extent and validity of a state's ratification of a proposed amendment;[15] the roles of Congress and the judiciary in determining the legitimacy of the ratification;[16] and the efficacy of the amendment process itself under Article V.[17]

Part I of this Note outlines the history of the Madison pay-raise amendment. Part II discusses the process of amending the Constitution and the two pivotal cases that have sparked debate over the meaning of Article V. Part III analyzes the invalidity of the ratification of the Madison proposal as the Twenty-seventh Amendment. Finally, this Note argues that the Madison amendment should be declared unconstitutional according to a more certain approach to ratification procedure which is consistent with the explicit *and* implicit provisions of Article V.

## I. THE MADISON PAY-RAISE AMENDMENT

James Madison introduced twelve amendments to the federal Constitution in 1789, in large part, as an attempt to garner broader support for the unprecedented government charter.[18] Antifederal-

15. *See* Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 881 n.21 (1980) (arguing that a state's ratification is valid for only that time intended by the legislature and that the contemporaneous consensus rule "should preclude an automatic assumption that each ratification is a blank check made to the order of Congress"). See also *infra* notes 181-92 and accompanying text for discussion of time limitation requirements within the amending process.

16. *See, e.g.*, Walter Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446 (1983) ("Congress should not have exclusive authority, binding upon the courts, to determine whether a proposed amendment has been validly ratified."). *But see* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (arguing that the amendment process is "quintessentially political" and warrants "substantial deference" to Congress).

17. Article V provides, in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

18. Madison wrote at the time to his friend Jefferson about his reasons for agreeing with those in favor of amending the Constitution: "[a] bill of rights, incorporated in the constitution will be proposed, with a few other alterations most called for by the opponents of the Government and least objectionable to its friends." THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 3 (Eugene W. Hickok, Jr., ed., 1991). The Constitution had been received in the state conventions with much ambivalence. For example, in Rhode Island's constitutional convention, only 51.5 percent of the delegates were in

ists had serious doubts about their new frame of government and sought to have more specific controls placed on federal powers.[19] In particular, Madison sought to dispel the fears of his contemporaries, Federalists and Antifederalists alike,[20] concerning the seemingly predominant role of the Congress in their new government.[21]

By 1789, each of the original thirteen states had constitutions or charters which enumerated specific individual rights and checks on governmental powers.[22] In order to extend these principles to the federal government, most of the states requested that amendments be added to the Federal Constitution, some demanding as many as thirty-two alterations.[23] Although Madison was initially reluctant

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favor of adoption. New York's vote was 30-27, the tally in Virginia was 89-79, and 187 Massachusetts delegates favored ratification over the 168 delegates who voted against the adoption of the amendment. VIRGINIA COMMISSION, *supra* note 9, at 37-38.

19. See RUTLAND, *supra* note 9, at 216 for a discussion of Antifederalist fears concerning the powers of the federal government.

20. *Id.* At least two delegates to the Constitutional Convention of 1787 specifically objected to the power given to Congress to raise their own pay. Virginia Governor Edmund Randolph lamented the "want of some limit to the power of the legislature in regulating their own compensations." 5 ELLIOT'S DEBATES, *supra* note 8, at 534-35. Elbridge Gerry, a Massachusetts delegate, listed "the unlimited power of Congress over their own compensations" among those objections "which determined him to withhold his name from the Constitution." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 632-33 (1911).

21. *See* THE FEDERALIST NO. 51, at 355 (James Madison) (M. Walter Dunne ed., 1901) ("In republican government, the legislative authority necessarily predominates."). Madison also publicly expressed concern over the "seeming indecorum" inherent in Congress' power to determine its own pay. *See* 138 CONG. REC. E1301 (daily ed. May 8, 1992) (extension of remarks of Rep. J.J. Pickle of Texas). *Cf.* THE FEDERALIST NO. 51, at 354-55 (James Madison) (Dunne ed., 1901) ("[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself . . . experience has taught mankind the necessity of auxiliary precautions."). Regarding the amendment process, delegates to the Constitutional Convention also expressed their fears of granting Congress too much power. Edmund Randolph criticized the "indefinite and dangerous power given by the Constitution to Congress." 2 FARRAND, *supra* note 20, at 631. Gouverneur Morris, a Pennsylvania delegate, warned that "legislative tyranny [was] the great danger to be apprehended" in the creation of their new government. 5 ELLIOT'S DEBATES, *supra* note 8, at 528. Colonel George Mason of Virginia stated that "the Senate [already has] too much power," 2 FARRAND, *supra* note 20, at 627, and urged adoption of a method of amending the Constitution which bypassed Congress:

> It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt. [sic]

1 *id.* at 202-03.

22. See ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 27 n.3 (1978) for a listing of the first constitutions of the original thirteen states.

23. Eight states voted to ratify the Constitution only on the condition that later amendments be adopted. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 569 (1985) (Powell, J., dissenting). Among these, New York asked for

to change the document he had worked so hard to create, he soon took the lead in composing acceptable alterations to the Constitution.[24] Madison promptly set about the task of choosing the best of these proposals and presenting them for the approval of Congress and the states.[25]

Madison's pay-raise proposal evolved directly from the eighteenth amendment proposed by the Virginia constitutional delegation.[26] Madison originally attempted to add the restriction to the text of the Constitution after Article I, section 6, clause 1.[27] The First Congress, however, passed the proposal as "Article II" of twelve proposed amendments.[28]

With slightly altered language, Congress submitted the then second amendment to the states for ratification on September 25,

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thirty-two changes, North Carolina requested twenty-six, Rhode Island twenty-one, Virginia twenty, New Hampshire twelve, and Massachusetts nine. VIRGINIA COMMISSION, *supra* note 9, at 38-39. Most of these states' proposals were repetitive of one another. *Id.*

24. GRIMES, *supra* note 22, at 12. Madison has been quoted as saying to the Convention:

> I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. We have in this way something to gain, and, if we proceed with caution, nothing to lose.

*Id.*

25. *See id.* at 12-18 (discussing Madison's efforts on behalf of the Bill of Rights).

26. See 1 ELLIOT'S DEBATES, *supra* note 8, at 657-63 for the text of the Virginia proposals. *See also* THE ANTIFEDERALISTS 434-35 (Cecelia M. Kenyon, ed., 1985) (analyzing the effects of the Virginia proposals on the Convention). The Virginia resolution, which was to become the Madison pay-raise amendment, was written by George Mason:

> 18th. That the laws ascertaining the compensation of senators and representatives for their services, be postponed, in their operation, until after the election of representatives immediately succeeding the passing thereof; that excepted which shall first be passed on the subject.

*Id.* New York and North Carolina submitted very similar proposals within two months of Virginia's proposed amendment. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 514 (1992).

27. "Senators and Representatives shall receive a compensation for their services, to be ascertained by law." U.S. CONST. art. 1, § 6, cl. 1. Madison's original version of the proposal was "[b]ut no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives." GRIMES, *supra* note 22, at 13. At the Constitutional Convention, delegates also considered inserting into Article I the word "liberal" to describe congressional compensation. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 107-08 (Ohio University Press ed., 1966). For insight into the evolution of the congressional salary issue at the Constitutional Convention, see *id.* at 106-77.

28. See *supra* note 8 discussing the original twelve proposed amendments.

1789.[29] By the end of 1791, six states had ratified the amendment[30] and five states either omitted or rejected it in ratifying the Bill of Rights.[31] At the time, enough opposition clearly existed to declare the amendment defeated.[32] The proposal was generally considered to have failed[33] and was quickly forgotten as the 18th Century drew to a close.

While the pay-raise amendment lapsed into obscurity, the debate over congressional salaries roared on.[34] Despite Federalist

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29. VIRGINIA COMMISSION, *supra* note 9, at 110. There exists no record of the vote in either House. *Id.* Three days earlier, Congress passed a law fixing the pay for Senators and Representatives at six dollars for every day they attended. *Id.* This measure was received with much criticism because, at the time, the salary of British Parliament members was only six shillings per diem. *See* 138 CONG. REC. H3090 (daily ed. May 11, 1992) (statement of Rep. Don Edwards of California). See also LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1948) for a historical study of the compensation of American officials in the post-revolutionary era.

30. Maryland ratified the amendment, as well as the Bill of Rights, on December 19, 1789. VIRGINIA COMMISSION, *supra* note 9, at 110. Shortly thereafter, five other states ratified the amendment and the Bill of Rights: North Carolina on December 22, 1789; South Carolina on January 19, 1790; Delaware on January 28, 1790; Vermont on November 3, 1791; and Virginia on December 15, 1791. *Id.* At the time, eleven states were required for ratification. *Id.* For dates of ratification by each of the states, see Bernstein, *supra* note 26, at 539 n.214; DeBenedictis, *supra* note 11; *see also* 138 CONG. REC. S6831-35 (daily ed. May 19, 1992). Note that North Carolina has since reinforced its original approval, re-ratifying the Madison amendment on July 4, 1989. Bernstein, *supra* note 26, at 539 n.214.

31. In approving the other proposed amendments, New Jersey "excepted" as to the then second amendment on November 20, 1789, as did New York on February 24, 1790. VIRGINIA COMMISSION, *supra* note 9, at 110. Pennsylvania and Rhode Island omitted the proposal from its list of ratifications on March 10, 1790, and June 7, 1790, respectively. *Id.* New Hampshire expressly rejected the measure on January 26, 1790. *Id.* New Hampshire and New Jersey later rescinded their rejections of the amendment; New Hampshire voted to ratify the Madison amendment on March 7, 1985, while New Jersey approved the amendment on May 7, 1992. Bernstein, *supra* note 26, at 539 n.214. Connecticut, Georgia, and Massachusetts, three states that did not originally endorse any of the Bill of Rights amendments, "formally ratified the measures" in 1941 during the 150th anniversary of the Bill of Rights. RUTLAND, *supra* note 9, at 220 n.65. Curiously, this was not recognized by the National Archivist, who stated that "[t]here is no evidence of the ratification of these amendments" by these three states. 138 CONG. REC. S6835 (daily ed. May 19, 1992) (Archivist's note). Connecticut later ratified the Madison amendment on May 13, 1987, as did Georgia on February 2, 1988. Bernstein, *supra* note 26, at 539 n.214.

32. Professor Richard Bernstein stated that the six to five vote against the Madison amendment made "its ratification impossible." Bernstein, *supra* note 26, at 532-33.

33. See *supra* notes 9-10 for examples of authorities who have considered the amendment dead.

34. For a general discussion of the compensation of public officials in the 1790s, see WHITE, *supra* note 29, at 291-302.

In reaction to an attempted salary increase in 1816, some members of Congress proposed constitutional amendments similar to the Madison amendment. Bernstein, *supra* note 26, at 533. On December 10, 1816, Senator James Barbour of Virginia introduced a resolution proposing an amendment to the Constitu-

forecasts of the dire consequences of underpaying public servants,[35] most Americans in the early Republic "favored economy if not parsimony" in compensating members of Congress.[36] Many state constitutions already contained restraints on legislative salaries[37] and many Americans resented the amount of their tax money that went to people acting as their public "servants."[38] This issue, however,

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tion which was virtually identical to the Madison amendment: "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened." 30 ANNALS OF CONG., 14th Cong., 2d Sess. 30 (1816). At the next session of Congress, the Tennessee legislature presented to the Senate a similar amendment proposal, resolving "[t]hat no law, varying the compensation of the members of the Congress of the United States, shall take effect, until the time for which the members of the House of Representatives of that Congress by which law was passed shall have expired." 31 ANNALS OF CONG., 15th Cong., 1st Sess. 170 (1818). The legislature of Massachusetts proposed a similar amendment in 1816, as did Kentucky and Georgia in 1817, passing "resolutions proposing an amendment to prohibit Congress from passing any bill changing the compensation of Members which should take effect during the life of the existing Congress." Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, *in* 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, at 35, 305 (1897).

It is quite revealing that none of these proposals invoked the Madison amendment and that no one advocated its ratification. *Cf.* Bernstein, *supra* note 26, at 533 (discussing some of these proposed amendments). This fact strongly suggests that Congress no longer believed the Madison amendment to be viable even twenty-seven years after its proposal.

35. President George Washington warned Congress in 1796:

> If private wealth, is to supply the defect of public retribution, it will greatly contract the sphere within which, the selection of Characters for Office, is to be made, and will proportionally diminish the probability of a choice of Men, able, as well as upright: Besides that it would be repugnant to the vital principles of our Government, virtually to exclude from public trusts, talents and virtue, unless accompanied by wealth.

WHITE, *supra* note 29, at 291. For an argument that modern legislative salaries are insufficient to attract the best potential lawmakers, see Andrew Blum, *Losing Its Allure: Lawyer/Legislators Are a Dying Breed—It Just Doesn't Pay*, NAT'L L.J., Sept. 7, 1992, at 1, 34.

36. WHITE, *supra* note 29, at 293. Republicans were also torn over the issue. However, the sentiments of John Page, expressed to Congress in 1795, eventually prevailed: "[W]ho ought not to desire that, as all offices are open to all, that the son of the poorest citizen might be enabled, if qualified, to fill a seat here or elsewhere, to do it without sacrificing his private interest?" *Id.* at 293 n.9.

37. *See, e.g.*, 138 CONG. REC. S6837, S6846 (daily ed. May 19, 1992) (ratifying resolutions of Colorado, New Jersey, and Illinois).

38. WHITE, *supra* note 29, at 293. *See also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1146 (1991) (discussing public outrage at the first congressional pay raise, which was enacted in 1816). Professor Amar states that the increase took effect immediately and met with widespread disapproval: "an enraged electorate responded by voting congressional incumbents out of office in record numbers. Opposition to the act found voice not simply in newspapers, but in grand jury presentments, petitions, and local resolutions—all adopted by ordinary citizens." *Id.* (footnote omitted). For constitutional amendments proposed in reaction to this pay raise, see *supra* note 34.

More amendment proposals on the compensation issue followed in 1822. Representative James Blair of South Carolina introduced the following amendment: "That no increase or diminution of the compensation to Representatives,

faded from view as the concerns of the 19th Century Union eclipsed administrative worries.

No state considered adding the Madison amendment to the Federal Constitution for another eight decades.[39] In response to the "salary-grab" act passed by Congress in 1873,[40] the Ohio legislature passed a joint resolution on May 6 of that year calling for repeal of the statute.[41] At the same time, the Ohio Senate and House passed a joint resolution ratifying the Madison amendment.[42] Although there was some dispute among the Ohio legislators as to

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for their services as such, shall be made by Congress, to have effect or operation during the period for which the members of the House of Representatives, acting upon the subject, shall have been elected." 38 ANNALS OF CONG., 17th Cong., 1st Sess. 1752 (1822). In May of that year, Representative Alfred Conkling of New York introduced a similar amendment proposal:

> That no increase of the compensation of members of Congress shall take effect during the continuance of the Congress by which it shall have have been made. And no law shall be passed fixing the pay of members of Congress at a greater sum than six dollars for each day's attendance . . . .

*Id.* at 1768. Later that month, Representative Timothy Fuller of Massachusetts introduced yet another amendment requiring congressional compensation to be

> fixed by law at the first session of every Congress elected next after the Representatives shall be apportioned among the several States, according to a new census, taken pursuant to the Constitution, and shall not be increased or altered for the term of ten years . . . but no increase or alteration of such compensation shall take effect till after the term shall have expired for which the persons holding the offices or stations aforesaid at the time of such increase or alteration, shall have been respectively elected.

*Id.* at 1778. Again, despite the similarities between these proposals and the Madison amendment, no member of Congress mentioned Madison's proposal. Thus, just thirty-three years after the Madison amendment's introduction, Congress believed it to be dead and unrevivable.

39. In supporting the amendment in the 102d Congress, Senator Robert Kasten of Wisconsin argued, curiously enough, that "there is an *unbroken* record of popular support for this amendment stretching back over two centuries." 138 CONG. REC. S6500 (daily ed. May 12, 1992) (emphasis added).

40. 17 Stat. 485-91 (1873). This joint resolution was passed on March 3, 1873, to take effect on June 30 of that same year. The measure increased the compensation of Senators and Representatives to $7500 per year, the President's pay to $25,000 per annum and the Vice President's salary to $8000. By comparison, the firemen of the Capitol were to be paid $1095 for that year. The resolution explicitly stated that the pay raises "shall begin with the present Congress." *Id.* *See also* Ralph R. Martig, *Amending the Constitution: Article V — The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1283 n.139 (1937) (discussing the "salary-grab" act).

41. 1873 Ohio Laws 410. The resolution declared:

> The action of the last Congress increasing the compensation of the members thereof, the President of the United States, and other officers, was unnecessary, uncalled for, and distasteful to the people of Ohio, and, it is believed, of the whole Union, and its speedy repeal earnestly demanded by the people.

*Id.*

42. *Id.* at 409-10.

the effect of the resolution and the validity of the amendment,[43] their resolution included a statement that Madison's amendment was "still pending for ratification."[44] This gesture was viewed as primarily symbolic[45] and no states took further action on the amendment.

More than a century later,[46] however, Wyoming became the eighth state to ratify the proposal.[47] The 1978 resolution indicated that the Wyoming legislature ratified the amendment in response to a congressional pay hike which was passed without a record vote and which had immediate effect.[48] The Wyoming legislature condemned Congress' action as setting a bad example for those people whose pay increased at a much slower rate than the salaries of members of Congress.[49]

Five years later, in 1983, renewed interest in legislative reform

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43. *See* 1873 OHIO SENATE JOURNAL 590, 666-67; 1873 OHIO HOUSE JOURNAL 848-49, for the records of the Ohio legislatures' actions on these proposals. The Ohio Senate Committee on the Judiciary reported that

> [T]hey are unanimously in favor of the principle embodied in the proposed amendment. They are, however, divided in opinion as to the validity and effect of a ratification of said amendment by this Great Assembly, on account of the great lapse of time, the increase in the number of states of the Union since it was proposed, and the fact that other and intervening amendments have been added to the constitution.

1873 OHIO SENATE JOURNAL 667. In fact, twenty-three states had been added to the Union in the eighty-two years between Madison's 1789 proposal and Ohio's ratification, while five other amendments were proposed and promptly ratified during that same period. Amicus curiae brief at 18, Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992) (No. 92-2427) (filed by Common Cause).

44. 1873 Ohio Laws 410. Apparently the 43d Congress did not share in this opinion. Members of Congress ignored the Madison amendment and introduced five pay-raise amendments of their own. Ames, *supra* note 34, at 35. All of these proposals were quite similar to the Madison amendment, *id.*, and were introduced amid a flurry of bills restricting congressional salaries. *See* 1 CONG. REC. 59, 61, 65, 92 (1873) (listing no less than nineteen bills and resolutions introduced between December 4 and 8 regarding congressional compensation). The clamor to introduce legislation on this matter moved Representative Benjamin Franklin Butler of Massachusetts to ask for "a recess for fifteen minutes, so that the rest of us can prepare bills on the same subject. [Laughter]." *Id.* at 59. One of the bills introduced was Louisiana Representative Frank Morey's, "a bill . . . to abolish all salaries and allowances of members of Congress, [laughter]." *Id.*

45. *Cf.* Bernstein, *supra* note 26, at 534 (describing the Ohio ratification as a "protest gesture").

46. See *supra* note 39, regarding the allegedly "unbroken" support for this amendment. In the intervening 103 years between Ohio's ratification and Wyoming's in 1978, thirteen more states "joined the Union, eleven amendments were approved, and the scope and complexity of the issues confronting lawmakers grew explosively." Amicus brief at 18, *Boehner* (No. 92-2427).

47. 138 CONG. REC. S6836 (daily ed. May 19, 1992) (National Archivist's reprint of Wyoming resolution to ratify proposed amendment).

48. *Id.* The resolution also stipulated that Congress had not placed a time limit on the amendment when it was proposed. *Id.*

49. *Id.* Interestingly, the resolution neglected to include Ohio among the states which had previously ratified. *Id.*

sparked another revival of the pay-raise proposal.[50] Maine ratified the amendment on April 27, 1983,[51] followed one year later by Colorado.[52] Colorado started a trend, followed by thirteen more states,[53] whereby state ratifying resolutions specifically called on the authority of the 1939 United States Supreme Court case, *Coleman v. Miller*.[54] This case has generally been interpreted as granting Congress the final say in determining the validity of an amendment's ratification.[55]

Thirty-one more states have subsequently ratified the amendment, culminating with Illinois on May 12, 1992.[56] Two days before the official approval of Congress,[57] the Archivist of the United States, Don W. Wilson, certified the Twenty-seventh Amendment to the Constitution as valid.[58] Despite the importance[59] of such a rare occasion,[60] there was no ceremony marking the event.[61]

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50. The drive to ratify this amendment was led by the herculean efforts of Gregory D. Watson, who had written a term paper in college arguing that the amendment should be ratified. *See* 138 CONG. REC. E1309 (daily ed. May 8, 1992) (extension of remarks of Rep. Martin Frost of Texas). Mr. Watson received a "C" from his government professor. 138 CONG. REC. E1904-05 (daily ed. June 19, 1992) (extension of remarks of Rep. Pete Geren of Texas). Apparently Mr. Watson has had the last laugh. For more on Mr. Watson's role in ratifying the Madison amendment, see BERNSTEIN WITH AGEL, *supra* note 2, at 243-56, and Bernstein, *supra* note 26.

51. *See* 138 CONG. REC. S6837 (daily ed. May 19, 1992) (Colorado resolution reciting the date of Maine's approval); Bernstein, *supra* note 26, at 539 n.214 (listing date of ratification).

52. DeBenedictis, *supra* note 11.

53. See 138 CONG. REC. S6837-46 (daily ed. May 19, 1992) for the resolutions through which these states ratified the amendment.

54. 307 U.S. 433 (1939). See *infra* notes 111-75 and accompanying text for analysis of *Coleman* and its effects on the amending process.

55. The propriety of this interpretation is disputed. See *infra* notes 164-75 and accompanying text for the divergence of academic opinion as to this case.

56. *See* DeBenedictis, *supra* note 11.

57. See *supra* note 7 for the recorded votes of both Houses.

58. For the official publication of the "new" amendment, see 57 Fed. Reg. 21,187-88 (1992).

59. *See* 138 CONG. REC. S6939 (daily ed. May 20, 1992) (statement of Sen. Charles Grassley of Iowa) (stating that the "long-awaited" amendment was "crucial" and "I do not think the importance of this day can be minimized at all."). *Cf. id.* at H3456 (statement of Rep. Dick Swett of New Hampshire) (hyperbolically asserting that the principles of the Madison amendment would lead the nation to "enjoy a renaissance of freedom and progress worthy of the brave men and women who launched our great experiment with democracy over two centuries ago").

60. A total of 5,170 proposed amendments were introduced before Congress between 1788 and 1960. Only twenty-eight were submitted to the states for ratification and only twenty-three of those were ratified. VIRGINIA COMMISSION, *supra* note 9, at 39.

61. *Pay-raise Amendment Part of the Constitution*, CHI. TRIB., May 19, 1992, § 1, at 10. The article states that formal public ceremonies have traditionally been staged and that the current President, as a mere formality, usually signs the amendment: "Richard Nixon witnessed the certification of the 26th Amendment . . . Lyndon Johnson witnessed the certification of the 25th and

In the days following the certification of the Twenty-seventh Amendment, members of Congress briefly discussed the amendment's validity and their role in the amendment process.[62] Despite requests from certain members of Congress, however, no hearings were held to determine the constitutionality of the amendment.[63] Congress merely assumed that it had the power to declare the amendment part of the Constitution.[64]

Thus, in less than two weeks and without hearings *or* official findings, Congress finalized a process which took over two centuries to come to fruition. In view of the hostile political climate, especially the anger directed at Congress,[65] Congress members' eagerness to expedite the matter might better be characterized as a "mad rush" to claim credit for reforming the institution.[66] The results of this haste, however, could become more far-reaching than many members of Congress may have bargained for, affecting Article V and future amendment processes.

Along with the pay-raise amendment in 1789, Madison proposed an amendment restricting the number of representatives in Congress.[67] Eight states ratified that amendment, only one short of the amount needed for adoption at that time.[68] Congress also proposed an amendment in 1810 regarding titles of nobility, which sim-

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24th Amendments . . . Martha Girard, head of the Federal Register, witnessed certification of the 27th Amendment." *Id.*

62. *See, e.g.*, 138 CONG. REC. H3075 (daily ed. May 7, 1992) (statement of Rep. Boehner concerning ratification of the Madison pay-raise amendment); 138 CONG. REC. H3090 (daily ed. May 11, 1992) (statement of Rep. Edwards); 138 CONG. REC. S6644-46 (daily ed. May 14, 1992) (statement of Sen. Thad Cochran of Mississippi); 138 CONG. REC. H3380, H3382, H3396-40 (daily ed. May 19, 1992) (various Representatives); 138 CONG. REC. S6828-31 (daily ed. May 19, 1992) (statement of Sen. Byrd); 138 CONG. REC. S6939-40, S6949-50 (daily ed. May 20, 1992) (various Senators); 138 CONG. REC. H3456 (daily ed. May 20, 1992) (statement of Rep. Swett); 138 CONG. REC. E1456 (daily ed. May 20, 1992) (extension of remarks of Rep. William Clay of Missouri).

63. DeBenedictis, *supra* note 11.

64. *See, e.g.*, 138 CONG. REC. H3401 (daily ed. May 19, 1992) (statement of Rep. Wayne Owens of Utah). Representative Owens' statement was indicative of the view of most members of Congress, asserting that "we can clear up this legal matter simply by affirming ratification of the amendment on the House floor. After all, we are the representatives of the will of the people." *Id.*

65. See *supra* notes 5-6 regarding public hostility toward the 102d Congress.

66. 138 CONG. REC. E1456 (daily ed. May 20, 1992) (extension of remarks of Rep. Clay) ("In the recent mad rush to embrace the Madison amendment, many of its proponents have conveniently overlooked the fact that the Congress has already adopted that same policy with respect to any future pay adjustments," referring to automatic cost of living adjustments).

67. *See* 1 ELLIOT'S DEBATES, *supra* note 8, at 338 (quoting proposed first amendment). For a concise analysis of the failure of this amendment, see Amar, *supra* note 38, at 1137-45.

68. Ironically, it was the smallest state, Delaware, which played the largest role in defeating this amendment. Amar, *supra* note 38, at 1144-45.

ilarly failed.[69] Then, in 1861, just before Lincoln's inauguration, members of Congress approved a proposal calling for the prevention of any future amendment abolishing slavery.[70]

Each of these proposed amendments has lain dormant since its introduction. However, with the passage of the Twenty-seventh Amendment, precedent exists for the resurrection of these proposals as well.[71] Congress' claim of holding the power to resurrect the Madison amendment may also provide impetus for the future revitalization of a proposal which failed a decade ago, the Equal Rights Amendment.

This seems a highly unlikely proposition. However, according to some members of Congress and other proponents of complete congressional control over the amendment process, Congress could at any time in the future revive one or all of these amendments. Indeed, this school of thought would allow for Congress to do whatever it wants, at least with respect to time limitations. However, this view of the amendment process improperly excludes the judiciary from playing any role in checking the actions of Congress in regard to altering the basic charter of our government. As this Note discusses, the rationale for granting Congress unreviewable power to interpret the text of the Constitution in this regard is invalid.

## II. THE AMENDMENT PROCESS

In outlining the amendment process, this section first addresses the provision of the Constitution which allows for amendments. This section then analyzes two seminal Supreme Court decisions which speak to the issue of an amendment's timeliness. Finally, this section discusses the prevailing academic viewpoints with regard to ratification of constitutional amendments.

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69. The Act of January 12, 1810, prohibited citizens of the United States from accepting titles of nobility or government pensions from foreign countries. 2 Stat. 613 (1810); *see* Dellinger, *supra* note 10, at 427 n.199.

70. Dellinger, *supra* note 10, at 427 n.199.

71. Though this seems unlikely, constitutional scholars once thought that resurrection of the pay-raise proposal was equally improbable. *See* Dellinger, *supra* note 10, at 425 (asserting that a court could easily dispose of all these elderly amendments, including the Madison proposal, but that "[n]o such need, however, is likely to arise"); *see also* Lester B. Orfield, *The Procedure of the Federal Amending Power*, 25 ILL. L. REV. 418, 441 (1930) ("Thus it would seem too late at this date to attempt to ratify the two amendments proposed in 1789, that in 1810, and that in 1861."). On May 20, 1992, Senator Byrd introduced a resolution which would declare all of these amendments dead. S. Con. Res. 121, 102d Cong., 1st Sess. (1992). The proposal was sent to the Senate Committee on the Judiciary but was not acted upon during either session of the 102d Congress. Telephone interview with Susan Hampson, Staff Assistant to Senator Byrd (Oct. 29, 1992). The measure therefore died. *Id.*

### *A. Article V*

The Constitution specifically provides[72] for amending its own provisions.[73] Article V sets forth two alternative methods for both proposing and ratifying amendments. First, Congress may propose an amendment by a two-thirds vote of both Houses. Congress has used this method to introduce every amendment proposed thus far.[74] The other procedure allows for the legislatures of two-thirds of the states to call upon Congress for a constitutional convention.[75] The purpose of such a convention would be to propose one or more amendments.[76] This method has never been employed. Once an amendment has been proposed, Congress then determines the mode of ratification, either by submitting the amendment to conventions in the states or by merely sending the proposed amendment(s) to the legislatures of each state for approval.[77]

Article V states that an amendment is valid "when ratified by the Legislatures of three fourths of the several States, or by Con-

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72. U.S. CONST. art. V. See *supra* note 17 for the relevant text of Article V.

73. The framers of the Constitution recognized the need to change the nation's basic charter of government from time to time. The Articles of Confederation required unanimity among the states, an almost impossible proposition. ARTICLES OF CONFEDERATION art. XIII ("[N]or shall any alteration at any time hereafter be made in any of them [the Articles], unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state."). The Framers' dilemma was to make the Constitution amendable without rendering it subject to frequent changes. The compromise they reached called for "supermajorities" of both the Congress (two-thirds of both Houses to propose) and the states (two-thirds to propose and three-fourths to ratify). U.S. CONST. art. V. This approach has been said to favor the view of those who advocate making the Constitution less easily amendable. See *infra* notes 166-67 for discussion of these authorities.

74. Martig, *supra* note 40, at 1267.

75. U.S. CONST. art. V. Between 1789 and 1861, eight states formally applied to Congress to call a constitutional convention for the purpose of proposing amendments. Martig, *supra* note 40, at 1269. From 1893 to 1929, thirty-three more states made similar requests. *Id.* Congress ignored Wisconsin's 1929 demand that Congress comply with these requests. *See* 71 CONG. REC. 3369, 3856 (1929) (joint resolution requesting that Congress "perform the mandatory duty imposed upon it . . . by Article V" to call a convention). Commentators of that time asserted that this issue was similar to that addressed by the *Dillon* Court regarding contemporaneous consensus. Edward S. Corwin et al., *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 195-96 (1951); Martig, *supra* note 40, at 1269-70. It was therefore considered highly unlikely that the convention requests made prior to 1893 could have been valid. *Id.* at 1270. *See also* Orfield, *supra* note 71, at 421-22 (proposing that the "[t]he maximum life of a [convention] request should not be more than a generation").

76. This method provides an alternative for amending the Constitution which bypasses Congress. The Framers clearly foresaw the necessity of having an amendment procedure which does not come from those who already hold power because many amendments might purport to limit their authority. EDWARD L. BARRETT, JR. ET AL., CONSTITUTIONAL LAW CASES AND MATERIALS 157 (8th ed. 1989).

77. U.S. CONST. art. V. See *supra* note 17 for the relevant text of Article V.

ventions in three fourths thereof."[78] But, the text of the Constitution contains no restrictions on the shelf life of a proposed amendment.[79] The Supreme Court, however, held in *Dillon v. Gloss*[80] that the Constitution implicitly requires that a "contemporaneous consensus" exist among those states in favor of ratifying an amendment.[81] The current conventional wisdom, which claims *Coleman v. Miller*[82] as its support, holds that Congress has the sole power to determine almost all ratification disputes, including any controversy over the timeliness of ratification.[83]

### *B. Dillon v. Gloss*

In 1921, a unanimous Supreme Court held that Congress, in proposing the Eighteenth Amendment, could set a reasonable time period within which the states must ratify an amendment.[84] The case arose out of the arrest of J.J. Dillon for violation of the National Prohibition Act which implemented the amendment's prohibition against transporting liquor.[85] Mr. Dillon challenged the validity of the amendment, in part, on the grounds that Congress could not place a time limitation upon amendments which it may propose.[86]

Affirming a district court decision,[87] the Supreme Court upheld Congress' first attempt to place a specific time limitation upon the ratification of a proposed amendment.[88] The Court reviewed the ratification of previous amendments and found that many had been approved by the requisite number of states in less than one year.[89] The Court found that each of the first seventeen amendments were ratified within four years of their proposal.[90] The Court noted that, in setting a seven year period for the adoption of the Eighteenth Amendment, Congress had decided that this was a reasonable time

78. *Id.*

79. *Id.*

80. 256 U.S. 368 (1921).

81. *Id.* at 375. The Court stated that there was no textual support for the idea that "an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective." *Id.* at 374.

82. 307 U.S. 433 (1939).

83. Dellinger, *supra* note 16, at 446 n.3; see also *supra* note 17 for the text of Article V.

84. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

85. *Id.* at 370.

86. *Id.* at 370-71.

87. *Ex Parte* Dillon, 262 F. 563 (N.D. Cal. 1920).

88. *Dillon*, 256 U.S. at 371-72. The resolution by which Congress introduced the Eighteenth Amendment to the states declared that the proposed amendment would be invalid if not adopted within seven years. *Id.* at 370-71.

89. *Id.* at 372.

90. *Id.*

for states to ratify an amendment.[91] Agreeing with Congress' finding, the Court indicated that seven years was indeed reasonable and that the limitation was therefore constitutional.[92]

The unanimous Court also declared in dicta that Article V implicitly requires contemporaneous ratification by the states.[93] The Court stated that the functions of proposing and ratifying should not be divorced from each other[94] and that "ratification must be within some reasonable time after the proposal."[95] The Court went on to say that this contemporaneity must be sufficient "to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[96]

The Court specifically discussed the Madison amendment[97] and three other unratified amendments[98] in order to highlight the imprudence of adopting the "untenable" approach of allowing an overly broad ratification period.[99] Such a method of amending the Constitution would allow "ratification in some of the states many years since by representatives of generations now largely forgotten [to] be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation."[100] The Court made clear that such a delayed action was not consistent with Article V's implicit requirement that amendments "reflect the will of the people in all sections at relatively the same period."[101]

The Court in *Dillon* specifically held that Congress possesses the power to set a reasonable time period for ratification of an amendment to the Constitution.[102] The Court did not state who should determine reasonableness. However, the Court itself de-

91. "[T]he prevailing view in both houses was that some limitation was intended and that seven years was a reasonable time." *Id.* at 373.

92. "It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified." Dillon v. Gloss, 256 U.S. 368, 376 (1921).

93. *Id.* at 375.

94. *Id.* at 374-75 ("First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.").

95. *Id.* at 375.

96. *Id.*

97. Dillon v. Gloss, 256 U.S. 368, 372, 375 (1921).

98. *Id.* at 375. See also *supra* notes 67-71 and accompanying text for a discussion of the unratified amendments.

99. *Dillon*, 256 U.S. at 375.

100. *Id.*

101. *Id.*

102. *Id.* at 375-76.

cided that the seven year period set by Congress was reasonable,[103] thus assuming for itself the role of final arbiter on such issues.[104]

The Court linked Congress' power of setting reasonable time requirements to Article V's explicit delegation to Congress of the power to determine the mode of ratification.[105] The power to fix time limitations was not tied to Congress' power to *propose* amendments.[106] Rather, the Court described the ratification period as one of those "subsidiary matters of detail" which the Constitution generally leaves to Congress.[107]

Most notably, the *Dillon* Court framed its discussion of congressional power in terms of promoting the ideals of certainty and regularity in the amendment process.[108] In light of the brief time periods within which past amendments were ratified, the Court almost certainly viewed the reasonableness requirement as being suf-

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103. *Id.* at 376.

104. The Supreme Court had previously acted in this manner on numerous occasions involving the amendment process. *See, e.g.*, Rhode Island v. Palmer, 253 U.S. 350, 386 (1920) (holding that the Eighteenth Amendment "by lawful proposal and ratification, has become a part of the Constitution"); Hawke v. Smith II, 253 U.S. 231 (1920) (declaring that Article V prohibited submission of the Nineteenth Amendment to a referendum vote); Hawke v. Smith I, 253 U.S. 221, 231 (1920) (declaring unconstitutional an Ohio constitutional amendment by which a referendum was held in ratifying the Eighteenth Amendment to the Federal Constitution); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 (1798) (holding that the assent of the President is not required in amending the Constitution). In none of these cases did the Supreme Court consider the amendment process to be nonjusticiable or otherwise barred from judicial review by the political question doctrine.

105. Dillon v. Gloss, 256 U.S. 368, 376 (1921). The Court stated:

> Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.

*Id.*

106. *See* Patricia A. Brannan et al., *Critical Details: Amending the United States Constitution*, 16 HARV. J. ON LEGIS. 763, 779 (1979) (emphasizing the distinction made by the *Dillon* Court between these two powers). This distinction is essential to analyzing the issue of justiciability of disputes over the amendment process. Because the power of Congress to propose amendments is inextricably linked to the content of those proposed amendments, that power is not argued to be judicially reviewable. The substance of an amendment is clearly political and should not be justiciable in the federal courts.

However, the mode of ratification is properly regarded as a procedural matter. Since the power to limit the time for ratification is derived from the power of determining its mode, time limitations are also procedural in nature. It is argued here that the federal courts are capable of determining whether these procedural guidelines have been followed. Indeed, on its face, a rule seems improper which allows one branch of government to both set matters of legal procedure and to then also determine, unchecked by any other branch, whether they have properly followed those same procedures themselves. See *infra* notes 193-95 and accompanying text for this substance/procedure distinction.

107. *Dillon*, 256 U.S. at 376.

108. Brannan et al., *supra* note 106, at 778 n.47.

ficient to ensure a measure of uniformity within the amendment process.[109] As will be discussed, this goal has not been realized in the decades since *Dillon* was decided.[110]

### *C. Coleman v. Miller*

Eighteen years after its decision in *Dillon*, the Supreme Court was called on to decide a dispute over the validity of Kansas' ratification of the Child Labor Amendment.[111] Congress proposed the amendment in 1924 to allow itself to pass legislation regulating child labor.[112] Congress submitted the amendment to the state legislatures for approval, but in 1925, the Kansas legislature voted to reject it.[113]

By 1937, however, twenty-eight states had ratified the proposal.[114] Kansas again considered the amendment on February 15, 1937.[115] This time the Kansas Senate split evenly on the matter, twenty members voting for ratification, twenty against.[116] The Lieutenant Governor broke the tie in favor of ratification and the proposal then went before the Kansas House of Representatives, which also voted to ratify.[117] Kansas Senate and House members, some of whom had voted for ratification of the amendment, protested the action and filed suit in the Kansas Supreme Court.[118]

The plaintiffs sought to invalidate the Kansas Senate vote on several grounds. First, the legislators argued that the Lieutenant Governor had no right to vote on the proposal because he was not

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109. *Id.*

110. See *infra* notes 163-77 and accompanying text, discussing the confusion surrounding the amendment process; *cf.* CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 40 (1922) (asserting that the "fear" that a proposed amendment "might finally be ratified by the requisite number of States fifty or a hundred years after its submission [was put to rest by the *Dillon* Court's] holding that the Constitution necessarily implies a reasonable period for ratification").

111. 43 Stat. 670 (1924). The proposed amendment would have granted power to Congress to "limit, regulate, and prohibit the labor of persons under eighteen years of age." *Id.*

112. *Id.*

113. Coleman v. Miller, 307 U.S. 433, 435 (1939).

114. Homer Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 631-32 (1953). In its first three years, the amendment was rejected by both houses of the legislatures of twenty-six states. Transcript of Record at 11, Coleman v. Miller, 307 U.S. 433 (1939) (No. 7). In twelve more states, one house rejected the proposal. *Id.* Only five states ratified the amendment during this time. *Id.* The petitioners argued that the amendment had therefore been rejected in enough states to declare it invalid. *Id.* at 11-12.

115. Clark, *supra* note 114, at 631.

116. *Coleman*, 307 U.S. at 435-36.

117. *Id.* at 436.

118. *Id.*

elected as a member of the Kansas Senate.[119] Next, petitioners alleged that the amendment could not be reconsidered by the Kansas legislature because it had previously rejected the proposal.[120] Third, petitioners argued that the amendment was no longer valid because it had already been rejected by more than half the states.[121]

The final argument of the Kansas legislators alleged that the amendment proposal had been pending before the states for more than twelve years without being ratified.[122] Therefore, they asserted, the amendment was no longer timely.[123] The plaintiffs argued that the proposal was no longer validly before the Kansas legislature and had lapsed into a state of "innocuous desuetude."[124]

The Kansas Supreme Court held that the amendment was validly ratified and had not "lost its potency by old age."[125] The court quoted from Judge Jameson's treatise,[126] which the *Dillon* Court had cited with approval. The Kansas court stated that the "proposal 'has relation to the sentiment and felt needs of today' which seems to be the criterion adopted by the Supreme Court in *Dillon v. Gloss*."[127] The Kansas Supreme Court did not, however, hold that the time period between proposal and ratification was reasonable or that the Kansas legislature had so found.[128]

At about the same time, a similar suit was brought by members of the Kentucky state legislature concerning the same amendment. In *Wise v. Chandler*,[129] the Kentucky Court of Appeals held that the amendment was no longer validly before the Kentucky legisla-

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119. Transcript of Record at 53, Coleman v. Miller, 307 U.S. 433 (1939) (No. 7).

120. *Id.*

121. *Id.* at 58-59.

122. *Id.*

123. *Id.*

124. Petition for Writ of Certiorari at 20-21, Coleman v. Miller, 307 U.S. 433 (1939) (No. 7). Desuetude is defined as "disuse; cessation or discontinuance of use" and is usually "applied to obsolete practices and statutes." BLACK'S LAW DICTIONARY 449 (6th ed. 1990). *See also* Brief on Behalf of Petitioners at 32-37, Coleman v. Miller, 307 U.S. 433 (1939) (No. 7) (referring to the doctrine of desuetude). In their brief to the United States Supreme Court, the petitioners argued that *Dillon* was controlling on this issue:

> It would seem quite improper that an amendment proposed by the Congress should hang in thin air for generations. The Supreme Court has approved the thrice-repeated congressional expression to the effect that seven years is a reasonable time within which a proposed amendment should be ratified or rejected by the states.

*Id.* at 38.

125. Coleman v. Miller, 71 P.2d 518, 526 (Kan. 1937).

126. JOHN A. JAMESON, A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW (2d ed. 1869).

127. *Coleman*, 71 P.2d at 527.

128. *Id.*

129. 108 S.W.2d 1024 (Ky. 1937), *vacated as moot sub nom.* Chandler v. Wise, 307 U.S. 474 (1939).

ture because "by any yardstick, more than a reasonable time had elapsed."[130] Comparing the amendment process with the law of contract, the court stated that the "offer" of Congress' Child Labor Amendment proposal in 1924 had lapsed by 1937.[131]

Both the Kansas and Kentucky cases made their way before the United States Supreme Court in 1938.[132] Both cases were argued,[133] reargued, and decided on the same days.[134] The issues in both cases were identical except that involving the Kansas Lieutenant Governor's vote.[135] The Supreme Court vacated the Kentucky court's decision in *Chandler* on the grounds that it was moot.[136] However, a majority of the Court held in *Coleman* that the Kansas plaintiffs had sufficient standing to confer the Court's jurisdiction.[137]

That the Supreme Court could have decided the case on other grounds or simply passed on resolving the case is readily apparent.[138] Indeed, the odd split among the Justices in *Coleman* reflects the uncertainty and timidity of the Court regarding issues within the amendment process.[139] Nonetheless, the Court heard the case, but declined to pass judgment on the validity of such a dormant amendment proposal.[140] Instead, the Court decided that the question was political in nature, and deferred to the judgment of Con-

130. *Wise*, 108 S.W.2d at 1034.

131. *Id.* ("The fact that but one State (Colorado in 1931) acted between 1927 and 1933 indicates very strongly that general sentiment considered the proposition to be no longer before the people.").

132. Coleman v. Miller, 303 U.S. 632 (1938) (granting certiorari March 28, 1938); Chandler v. Wise, 303 U.S. 634 (1938) (granting certiorari April 11, 1938).

133. Coleman v. Miller, 307 U.S. 433 (1939); Chandler v. Wise, 307 U.S. 474 (1939).

134. The cases were handed down together on June 5, 1939. *Coleman*, 307 U.S. at 433; *Chandler*, 307 U.S. at 474.

135. Petition for Writ of Certiorari at 8-9, Coleman v. Miller, 307 U.S. 433 (1939) (No. 7).

136. *Chandler*, 307 U.S. at 477-78. The Court reasoned that, once the Kentucky Governor "forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination." *Id.*

137. *Coleman*, 307 U.S. at 437-47, 470-74. *Coleman* is often regarded as a seminal case, but is cited as authority for the standing of state legislators suing in federal court much more often than it is used for its political question holding. Amicus curiae brief at 28, Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992) (No. 92-2427) (filed by Common Cause).

138. See *supra* notes 118-24 and accompanying text for the plaintiffs' stated grounds for relief; *see also* Dellinger, *supra* note 10, at 412 (stating that, because three-fourths of the states had not ratified, the case was not ripe for review).

139. The Court's division was "sufficient to confound prophets and critics of all schools . . . [and] should astonish even a Yogi magician." Note, *Sawing a Justice in Half*, 48 YALE L.J. 1455 (1939). None of the Court's four opinions commanded a majority of the nine Justices who participated in the case. *Id.*

140. Coleman v. Miller, 307 U.S. 433, 456 (1939).

gress to decide on issues of ratification timeliness.[141] This was done despite the fact that the political question doctrine was not raised by either party.[142]

The "majority" of the Court[143] held that petitioners had standing,[144] but that timeliness of an amendment's ratification was political in nature and, thus, prevented judicial resolution of the issue.[145] The Court specifically left to Congress the power to determine the reasonableness of the time period in which the Child Labor Amendment had been ratified.[146] The Court asserted that

> the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice.[147]

The Court stated that Congress was better suited to determine whether conditions in the country had changed so as to render the proposed amendment "no longer responsive to the conceptions which inspired it."[148] The Court cited cases which had decided on past matters concerning the validity of an amendment,[149] including *Dillon*.[150] However, Chief Justice Hughes wrote that there were

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141. *Id.*

142. *Id.* at 474 (Butler, J., dissenting).

143. The "Opinion of the Court" was written by Chief Justice Hughes, who was joined only by Justices Reed and Stone. *Id.* at 435. Justices McReynolds and Butler agreed with the Chief Justice on the issue of jurisdiction, but dissented as to the result. Note, *supra* note 139, at 1457.

144. *Coleman*, 307 U.S. at 437-46.

145. *Id.* at 454.

146. *Id.* at 453. The Court stated that this issue was not judicially reviewable:

> Our decision that the Congress has the power under Article V to fix a reasonable time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment.

*Id.* at 454.

147. *Id.* at 453.

148. Coleman v. Miller, 307 U.S. 433, 453 (1939).

149. The Court cited Leser v. Garnett, 258 U.S. 130 (1922), and Hawke v. Smith, 253 U.S. 221 (1920), both of which decided that an amendment to the Constitution had been validly ratified. *Coleman*, 307 U.S. at 438.

150. *Coleman*, 307 U.S. at 452-53. The Court first listed the reasons stated by the *Dillon* Court for upholding Congress' power to fix time limits:

> But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in Dillon v. Gloss . . . and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

*Id.*

too many variables for the Court to take into account in deciding such an issue.[151]

The four concurring Justices, led by the former New Deal Senator Hugo Black,[152] took the opportunity to declare their belief that all questions involving the amendment process are nonjusticiable political questions.[153] These Justices stated that deciding issues such as "submission, intervening procedure or Congressional determination of ratification" was a task best left for a political branch.[154] Justice Black's opinion went on to assert that the amending process "is 'political' in its entirety, from submission until an amendment becomes a part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[155]

The dissent would have held that the lapse of time rendered the amendment invalid, even though only thirteen years had elapsed between submission and ratification.[156] The dissenters excerpted several paragraphs of the *Dillon* opinion, characterizing its holding as requiring, under Article V, that any lapse of time must be reasonable and that seven years was reasonable in that case.[157] The dissent also stated that the *Dillon* Court had "directly decided upon the reasonableness of the seven years fixed by the Congress,"

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151. *Id.* at 453. This line of reasoning would seem to fit within the "lack of judicially manageable standards" prong of the political question doctrine, as articulated in Baker v. Carr, 369 U.S. 186, 208-38 (1962). Such an absence of criteria would preclude judicial determination of an issue. *Id.*

152. Professor Grover Rees has theorized that Justice Black came to the Court with an agenda: Justice Black was in favor of the Child Labor Amendment because it overruled a previous Supreme Court ruling which denied Congress the power to make legislation which so regulated national economic conditions. Grover Rees III, *Rescinding Ratification of Proposed Constitutional Amendments: A Question for the Court*, 37 LA. L. REV. 896, 913-14 (1977).

153. *Coleman*, 307 U.S. at 456-60 (Black, J., concurring).

154. *Id.* at 457. The concurring Justices made clear their disagreement with the "majority":

> To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

*Id.* at 458. In contrast to Chief Justice Hughes, Justice Black relied upon the Constitution's grant of the power to propose amendments to warrant judicial abstention. *Id.* at 459. This is comparable to the "textually demonstrable constitutional commitment" prong of the political question doctrine. *See* Rees, *supra* note 152, at 912. However, Article V states nothing of any role for Congress in the *ratification* process. *Supra* note 17. Because Article V allows Congress the power to merely *propose* amendments, there is no "textually demonstrable" commitment of power to decide the validity of an amendment's ratification.

155. *Coleman*, 307 U.S. at 459. Professor Rees has pointed out that Justice Black's opinion cited no historical authority for his position and "flagrant[ly] misquot[ed]" the only case it cited that even "related to constitutional amendments." Rees, *supra* note 152, at 913.

156. *Coleman*, 307 U.S. at 471-74 (Butler, J., dissenting).

157. *Id.*

and reminded the Court that the political question doctrine had not been raised by either party or by amicus, nor was it "suggested by us when ordering reargument."[158]

No opinion in *Coleman* managed to gain the support of a majority of the Court. Nonetheless, this case has been considered dispositive on the issue of which branch of government retains authority to decide cases involving the amendment process and the timeliness issue in particular. A number of scholars have recognized that this may not be so. These legal commentators have described the *Coleman* decision alternatively as "disastrous,"[159] an "aberration,"[160] a case of judicial "hot potato,"[161] and an example of the maxim, "hard cases make bad law."[162]

### *D. Scholarly Debate*

Much debate has arisen between constitutional scholars seeking to reconcile *Dillon* with *Coleman*[163] with respect to amending the Constitution. This controversy tends to center around the divergent views of the ideals and goals of the amendment process. Just as Jefferson and Madison debated more than two hundred years ago,[164] some academics believe that the Constitution should

158. *Id.*

159. Dellinger, *supra* note 10, at 387.

160. *Id.* at 389.

161. Rees, *supra* note 152, at 914 n.121 (citing Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 587-89 (1966)).

162. *Id.* at 908.

163. Many commentators are critical of the *Coleman* decision. *See, e.g.*, Dellinger, *supra* note 16; Tribe, *supra* note 16; Dellinger, *supra* note 10; Rees, *supra* note 15; Brannan et al., *supra* note 106; Rees, *supra* note 152; Lynn Andretta Fishel, Note, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147, 165-66 (1973) (criticizing *Coleman* and arguing that "there is room for both Court and Congress in interpreting Article V" and phrase "when ratified"); William L. Dunker, Comment, *Constitutional Amendments: The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93, 111 (1973) (arguing that amendment issues are justiciable); Clark, *supra* note 114; Corwin et al., *supra* note 75, at 213 (criticizing *Coleman*'s reliance on the extraordinary ratification of the Fourteenth Amendment as precedent for granting Congress greater power over the amendment process).

164. Jefferson believed that "the earth belongs in usufruct to the living" and desired a constitutional convention every nineteen years to allow each generation to determine its own government. JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT 3-4 (1991). Madison was more cautious, stating that, absent proper public expressions to the contrary, each generation could be considered as having consented to the government of their forbears. *Id.*; *see also* JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 62-67, 71-74 (1992) (expanding on the Madison and Jefferson views on the amending process).

be more readily amendable,[165] while others desire an amendment process which makes it more difficult to change the nation's basic charter.[166] Although the text of Article V seems to favor the latter view,[167] the Constitution does not speak on specific questions concerning the amendment process.[168] The result has been great confusion as to how and when an amendment should properly be

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165. *Cf.* Ruth B. Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979) (arguing that Congress should provide greater leeway in the amending procedure); Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 60 AM. U. L. REV. 181 (1926) (arguing that the amendment process was difficult enough without adding stricter requirements). George Mason supported this view in the Constitutional Convention:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.

1 FARRAND, *supra* note 20, at 202-03. Alexander Hamilton agreed, stating that "an easy mode should be established for supplying defects which will probably appear in the new system." 5 ELLIOT'S DEBATES, *supra* note 8, at 531. Hamilton went beyond Mason, however, to predict that Congress "will be the first to perceive, and will be most sensible to, the necessity of amendments" and should therefore be given the power to propose them. *Id.*

166. Rees, *supra* note 152, at 899 ("[A]ny ambiguity in the language of Article V ought to be resolved in favor of the interpretation which would make it *more difficult* to amend, and which would prevent change absent a sufficiently broad consensus.") (emphasis in original). This view appears to be consistent with the intention of a majority of delegates of the Constitutional Convention. The Convention initially rejected a proposal requiring the consent of two-thirds of the states to propose amendments to the Constitution. 5 ELLIOT'S DEBATES, *supra* note 8, at 531. Instead, the Convention approved the addition of a clause in Article V which required *three-fourths* of the several states to propose any constitutional amendment. *Id.* Although the two-thirds requirement was later replaced in that space when the convention method of proposing amendments was added, *id.*, several delegates expressed their doubts about compromising this supermajority requirement. *Id.* Connecticut delegate Roger Sherman believed that even the requirement that three-fourths of the states ratify an amendment was insufficient to safeguard against doing "things fatal to particular States." 2 FARRAND, *supra* note 20, at 629.

167. "The language of the text is seemingly unambiguous, and it insists upon broad, substantial, and widespread geographical support for proposed amendments." David R. Dow, *When Words Mean What They Say: The Case of Article V*, 76 IOWA L. REV. 1, 30 (1990). Professor Dow insists that the text of Article V dictates that the latter, Madisonian, view govern within the amendment process: "Amending the Constitution is thus, prima facie, rather difficult, both because the process is tedious and because the process requires a supermajority: two-thirds to propose amendments, three-fourths to ratify." *Id.* at 29-30 (footnotes omitted). Professor Dow argues that this view is necessarily favored by the Constitution as a safeguard: "Amendments require super-majorities because the core philosophical notion that animates the Constitution is that simple majorities are, normatively speaking, insufficient to effect constitutional change or modify protected rights." *Id.* at 4.

168. "The United States Constitution possesses many strengths, but thorough delineation of procedural detail is not among them." Brannan et al., *supra* note 106, at 763.

adopted and as to who should make these determinations.[169]

There are two main schools of thought surrounding both the process of ratifying an amendment. The most widely held view, following *Dillon*, assumes that the ratification of an amendment must take place within some reasonable time after it was proposed, thus, requiring a contemporaneous consensus.[170] However, a minority of commentators believe that this requirement is unjustified.[171]

Further controversy arises as to who should have the final say in determining whether the amendment procedure of Article V has been followed. The Constitution expressly grants to Congress the power to propose amendments.[172] However, Article V also provides a method of proposing amendments which excludes congressional input.[173] The Constitution's framers recognized the need for such a method in order to avoid legislative tyranny.[174] But the majority of legal and political commentators have assumed *Coleman* to be controlling, thus giving Congress complete power over most aspects of

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169. *See, e.g.*, Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63 (1978) (describing Article V cases as "inconsistent and ambiguous in evaluating justiciability [and failing] to provide a coherent approach"); *compare* Rees, *supra* note 15 (arguing that extending the deadline for approval of the Equal Rights Amendment was unconstitutional and that the federal courts could so declare) *with* Ginsburg, *supra* note 165 (arguing that ERA extension was validly within the constitutional prerogative of Congress, unreviewable by the courts).

170. See *supra* note 163 for a listing of these authorities.

171. *See, e.g.*, Dellinger, *supra* note 10, at 389 (arguing that the "uncertainty that currently afflicts the amendment process flows in part from the tendency to replace the formal test specified in Article V . . . with an ill-defined search for contemporaneous consensus").

172. See *supra* note 17 for the text of Article V.

173. U.S. CONST. art. V. Congress, when two-thirds of the legislatures of the several states apply, "will be obliged . . . to call a convention for proposing amendments. . . . Nothing in this particular is left to the discretion of that body." THE FEDERALIST NO. 85, at 170 (Alexander Hamilton) (Dunne ed., 1901).

174. See 2 FARRAND, *supra* note 20, at 629 n.8, citing Mason's written objections to a draft of Article V which did not include the convention method:

> Article 5th — By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people.

*Id. Cf.* THE FEDERALIST NO. 48, at 341 (James Madison) (Dunne ed., 1901), quoting Jefferson:

> The concentrating of [the powers of government] in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one . . . the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

*Id.*

the amendment process.[175]

Thus, a majority of commentators recognize the requirement of contemporaneous consensus among those states ratifying proposed amendments. Additionally, a majority also seem to believe that it is within the sole province of the Congress to determine if such a consensus exists. We are, therefore, left with a confusing amendment process in which Congress both chooses the procedure to be followed and then determines whether that procedure has satisfied constitutional requirements.

## III. THE UNCONSTITUTIONALITY OF THE TWENTY-SEVENTH AMENDMENT

"A satisfactory amendment process demands, at a minimum, that the rules for the adoption of an amendment be clearly understood."[176] Now that the Twenty-seventh Amendment has been recognized as part of the Constitution,[177] a number of questions arise as to the amendment's validity and its effect on the process of amending the Constitution. Instead of clarifying the proper procedure for changing our most basic charter of government, our latest amendment has highlighted the many uncertainties concerning when and how an amendment can be validly ratified.

First, the delayed ratification of the Madison amendment was contrary to the constitutional requirement of contemporaneous consensus. This rule was designed to prevent long-dormant amendment proposals from being resurrected by generations which had no part in proposing the measure. Second, in light of modern criticisms of the *Coleman* decision and the development of the political question doctrine since that case was decided, the judiciary should be able to determine the validity of our newest amendment. Granting Congress unreviewable power over the amendment process is not only an imprudent concentration of power in the legislative branch, but is also inconsistent with the concept of judicial review.

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175. *See, e.g.*, Tribe, *supra* note 16; Ginsburg, *supra* note 165, at 925-27; Clifton McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1003 n.8-9 (1968); Corwin et al., *supra* note 75.

This conception seems to be in direct contradiction to the desires of many of the Framers. Colonel George Mason of the Virginia delegation called the original plan for amending the Constitution only through Congress "exceptionable and dangerous." 2 FARRAND, *supra* note 20, at 629. Mason stated that "[a]s the proposing of amendments is in both modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case." *Id.* See also *supra* notes 21, 76, and 166, regarding fears of concentrating too much power in the hands of Congress.

176. Dellinger, *supra* note 10, at 387.

177. 57 Fed. Reg. 21,187-88 (1992).

Finally, in assessing the constitutionality of the Twenty-seventh Amendment's unusual ratification process, the Supreme Court can and should find that this two hundred year procedure violated the letter and spirit of the Constitution. To remedy this situation, the Court should employ a practical approach, designed to conform with the goals of contemporaneous consensus, and compel Congress to resubmit the amendment to those states which ratified it long ago.

### *A. The Contemporaneous Consensus Requirement*

The contemporaneous consensus standard which the unanimous *Dillon* Court found to be implicit in the text of Article V is a logical requirement which is consistent with the stringent "super-majority" prerequisites for altering the Constitution.[178] These requirements allow for amending our fundamental law only when the will of the nation is sufficiently united to effectively speak for all of its citizens.[179] Thus, proper respect for the Constitution demands that the procedures set forth by Article V be strictly adhered to, so as not to violate the principle of consensus.[180] This has not been done in the case of the Madison amendment.

#### *1. Timeliness requirement is implied in the Constitution*

It is evident from the text of Article V that the Constitution's Framers did not envision an extremely lengthy process in order to amend their work. Article V states that amendments may be proposed and ratified "*whenever* two thirds of both Houses shall deem it necessary."[181] From this provision, and "as ratification is but the expression of the approbation of the people,"[182] it logically follows that such ratification should take place at or near the time of an amendment's proposal.[183] This insures that ratification is an accu-

178. See *supra* notes 166-67 and accompanying text regarding the difficulty inherent in the "super-majority" requirements of Article V.

179. Dow, *supra* note 167, at 56. Professor Dow argues that the Constitution demands "virtually unanimous agreement":

> What is unmistakeably clear is that the delegates to the convention consciously and intentionally approved an amendment process that would bar mere majorities from altering the Constitution. The participants in the process understood that they were drafting and agreeing to be bound by a document that could only be changed upon the garnering of a supermajority.

*Id.*

180. This is consistent with the view that the Constitution should be interpreted in favor of making its alteration more difficult to achieve. See *supra* notes 166-67 discussing the view that the Constitution should be interpreted in favor of making its alteration more difficult to achieve.

181. U.S. CONST. art. V (emphasis added).

182. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

183. *Id.*

rate expression of the sentiment of the people throughout the country.[184]

The alternative mode of ratification is even clearer in this regard. By calling for conventions in order to ratify, the text of Article V necessarily contemplates that these temporary bodies would not take long to consider an amendment, nor could they be readily reconvened in order to do so.[185] Alexander Hamilton wrote concerning the ratification of an amendment:

> [E]very amendment to the Constitution . . . would be a single proposition, and might be brought forward singly. . . . The will of the requisite number would *at once* bring the matter to a decisive issue. And consequently, whenever [the requisite number of] States, were united in the desire of a particular amendment, that amendment must infallibly take place.[186]

Because conventions, as well as amendments, are proposed in order to remedy some defect perceived by the people, ratification must necessarily occur "early while that sentiment may fairly be supposed to exist."[187]

Further support for this requirement exists in the fact that the ten amendments comprising the Bill of Rights were all ratified by the requisite number of states within two years.[188] Those states which did not do so within that period were considered to have rejected the proposals.[189] Thus, it seems that the Framers and their contemporaries did not desire that a state's ratification occur long after that of any other state. Such action would not only fail to serve the purpose of the proposed amendment by delaying approval beyond the time for which an amendment is considered necessary, but would also cast doubt upon the status of the Constitution.

Considering the alternative to such a requirement of timeliness, its need becomes clearer. As the unanimous *Dillon* Court stated, an overly broad approach would allow for amendments to remain dormant for decades, only to be revived by a generation which might not interpret the amendment in the same light in which it was proposed.[190] This means that other amendments

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184. *Cf. id.* ("[A]n alteration of the Constitution proposed to-day has relation to the sentiment and felt needs of to-day, and . . . if not ratified early . . . it ought to be regarded as waived.").

185. *Cf. id.* at 373 ("[W]ith the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.").

186. THE FEDERALIST NO. 85, at 169 (Alexander Hamilton) (Dunne ed., 1901) (emphasis added).

187. Dillon v. Gloss, 256 U.S. at 368, 375 (1921) (quoting Jameson treatise).

188. *See supra* text accompanying notes 89-90.

189. *See supra* notes 8, 32 (regarding the failure of the Madison amendment).

190. *See Dillon*, 256 U.S. at 375. The Court quoted Judge Jameson's treatise:

> An alteration of the Constitution proposed today has relation to the sentiment and felt needs of today, and that, if not ratified early while that senti-

which gained partial support from a generation of people long since dead could be partially supported by the people of the present or some future generation.[191] Thus, amendments which were never fully ratified could later be resurrected and given force by less than three-fourths of the several states.[192] This action would clearly violate the text of Article V.

### 2. *The Madison amendment did not comply with the contemporaneous consensus requirement*

In applying the principles of the contemporaneous consensus standard to the Madison amendment, the amendment's validity depends upon a determination of whether or not two hundred three years is a reasonable amount of time within which to ratify an amendment to the Constitution. Determining whether an amendment sufficiently reflects the will of enough people at roughly the same time depends upon the circumstances of the amendment's ratification. This analysis entails deciding merely whether some "procedural irregularity"[193] has occurred in the course of the amendment's adoption, according to Article V. A court need not look into the substance[194] of an amendment in order to do this.[195]

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ment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.

*Id.* *Cf.* Dow, *supra* note 167, at 22-23. Professor Dow states that aspiring to some of the ideals of two centuries past might be a mistake:

> We may find if we look (and if we are honest) that what the framers believed is not in fact what we today believe; we may find that the political theory subscribed to by the framers is not the theory that animates our polity.

*Id.*

191. The *Dillon* Court described this approach as "untenable." 256 U.S. at 375.

192. See *supra* notes 67-71 and accompanying text for discussion of several amendments which were partially ratified many years ago but may nevertheless be considered pending under the precedent of the Madison amendment.

193. Elder, *supra* note 169, at 63.

194. See *supra* note 106 and accompanying text for the substance/procedure distinction.

195. Although a substantive analysis of the Madison amendment need not be indulged by the judiciary, there is much evidence that the 102d Congress' analysis of the amendment was seriously lacking. Ideally, a proposed amendment should have the same effect and meaning that it purported to have when originally proposed. Because of changes in the structure or practice of government, the perceived defect which the amendment was designed to remedy may no longer exist.

For example, the term "Senators" as we understand it today is far different from the "propertied white males selected by state legislatures" referred to by the Madison amendment. Amicus curiae brief at 33, Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992) (No. 92-2427) (filed by Common Cause). In 1789, Congress consisted of "only 26 senators . . . and 65 members of the House," part-time officials who usually maintained other means of income besides their congressional salaries. Vile, *supra* note 6, at 15, 16. The role of the federal government, and of Senators and Representatives in particular, has also expanded

The question to be answered is whether the votes of the six states which ratified the amendment prior to the 20th Century (and

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enormously in the last two hundred years. Amicus brief at 18, *Boehner* (No. 92-2427). These "dramatic changes" in government undermine the 102d Congress' claims that ratifications from the 18th, 19th, and 20th Centuries centered around "a commonly accepted meaning." *Id.* at 22.

At least one member of the 102d Congress believed that the amendment's use of the term "varying" means that the amendment was also meant to prevent congressional salaries from being lowered. *See* 138 CONG. REC. H3400 (daily ed. May 19, 1992) (statement of Rep. Neal Smith of Iowa). Representative Smith was one of only three members of Congress to vote against the resolution which declared the amendment a valid part of the Constitution:

> Hamilton wrote . . . 'In the general course of human nature, a power over a man's subsistence amounts to a power over his will.' They [the Framers] were afraid that people, wealthy people, powerful people, remembering back to what had happened in England, would try to control the government, try to control the independence of the courts by eliminating those who could not serve without adequate compensation or could be influenced by threatening to reduce the subsistence that depended upon. So they were not just interested in pay raises. They were talking about varying the compensation in any way.

*Id.* It is clear that our current understanding of the amendment may not be the same as that of the rural, penurious population residing in the original thirteen states over two centuries ago. *See* WHITE, *supra* note 29, at 293 ("The artisans, mechanics, farmers, and seamen of the time, working out-of-doors for a modest livelihood, were not likely to look with equanimity upon handsome livings to [government officials].").

The Madison amendment has been held not to prevent even nominal salary variations which would take effect through automatic cost-of-living adjustments. Boehner v. Anderson, 809 F. Supp. 138, 139-40 (D.D.C. 1992) (holding that the Twenty-seventh Amendment does not preclude annual cost-of-living adjustments). The Court refused to decide the constitutionality of the Twenty-seventh Amendment, stating, however, that "It clearly could not have been the concept of our founding fathers to provide government 'on the cheap.'" *Id.* at 140. An appeal is pending in the District of Columbia Court of Appeals. *See* Boehner v. Anderson, No. 93-5009, 1993 WL 190999 (D.C. Cir. May 25, 1993).

These annual adjustments are tied to the Employment Cost Index, which is based on changes in wages and salaries of private industry workers. Ethics Reform Act of 1989, Pub. L. No. 101-94, § 704, 103 Stat. 1716 (1989). This law already contains a provision postponing the effect of such raises until "an election of Representatives shall have intervened." *Id.* at § 701 (g)(4)(A). *See* 138 CONG. REC. E1456 (daily ed. May 20, 1992) (extension of remarks of Rep. Clay) (arguing that the applicability of the Madison amendment to such salary adjustments must be clarified by joint resolution). These periodic adjustments were designed to take the discretionary element of increasing congressional salaries out of the hands of Congress. *Cf.* CONGRESSIONAL ETHICS 72-73 (DuPre Jones ed., 2d ed. 1980) (reciting the history of special salary commissions and compensation laws).

The idea behind tying congressional salary increases to the Consumer Price Index was to leave the decision "to the president when he made his regular cost-of-living recommendations for other federal employees." *Id.* In this way, Congress was to enjoy pay increases only when other federal employees received them and thus prevent our public servants from leaving office for monetary reasons. *Id.* There is much evidence that many government officials leave public service because government salaries are not in keeping with the market value of their services. *See* LEGISLATIVE REFORM: THE POLICY IMPACT 23-33 (Leroy N. Rieselbach ed., 1978) (indicating that a large percentage of state legislators leave office because salaries are too low); *see also* Blum, *supra* note 35, at

failed to re-ratify) fairly reflect the will of the people now residing in those six states.[196] It seems inherently unfair that the losing votes of legislators long since dead could be held binding against their states, in which now reside an exponentially larger number of citizens than those legislators represented.[197] These current citizens did not vote for the legislators of two hundred years ago, nor did they have anything to do with proposing the amendment. That such an incomplete and failed proposal might be supplemented by the votes of less than the required number directly conflicts with the Constitution's express requirement that ratification occur only upon approval in three-fourths of the several states.[198]

Thomas Jefferson feared that the government created by his generation would not sufficiently speak for even the generation that followed.[199] The *Dillon* Court described as "untenable" the proposition that the votes of "representatives of generations now

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34 (asserting that modern state legislative salaries are insufficient to attract the best potential lawmakers and that private practice is easily more profitable). "If you expect work well done, you must pay well," WHITE, *supra* note 29, at 301 (quoting a 1791 newpaper editorial), instead of trusting the public interest to less qualified officials or to the dictates of well-funded special interest groups. In an era of high-priced lobbyists, lavishly financed political action committees, and monumentally expensive election campaigns, it may make better sense to pay more liberal salaries and eliminate unseemly and unnecessary influence of our public officials.

The renowned public interest organization Common Cause "championed the 1974 legislation that limited individual contributions to political campaigns, and in 1988 the group [successfully] pushed for a congressional pay raise linked to a ban on outside honoraria for congressmen." SUZANNE GARMENT, SCANDAL: THE CRISIS OF MISTRUST IN AMERICAN POLITICS 71 (1991). Despite these initiatives, numerous potentially serious conflicts exist with regard to the financial interests of congressmen. For example, in 1980 at least "26 House members served as directors of banks or savings and loan associations," some receiving salaries from these organizations comparable to their congressional salaries. CONGRESSIONAL ETHICS 75 (DuPre Jones ed., 2d ed. 1980). Congress, in refusing to hold hearings on these issues, failed to fulfill its responsibilities in determining the validity and effect of the substance of the Madison amendment.

196. These states are listed *supra* note 30.

197. The population of the six states which voted to ratify the Madison amendment between 1789 and 1791 was approximately 1.8 million. Amicus brief at 31, *Boehner* (No. 92-2427). Today, more than 33 million people reside in those states. *Id.* Maryland's population, for example, has grown from 320,000 in 1789 to 4,871,000 today. *Id.* Ohio's population has quadrupled since its legislature voted in favor of ratification in 1873. *Id.*

198. The current three-fourths ratification requirement dictates that thirty-eight states must ratify an amendment in order to bind all fifty. As it currently stands, the Madison amendment has garnered the approval of only thirty-five states in the twentieth century. See *supra* notes 46-61 and accompanying text regarding recent ratifications; see also *infra* note 280 regarding the seeming impossibility that Congress would declare thirty-five ratifications to be sufficient to amend the Constitution.

199. Jefferson wrote to Madison in 1789, " 'the earth belongs in usufruct to the living' . . . the dead have neither powers nor rights over it." JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT 3 (1991) (footnote omitted).

largely forgotten" could remain effective and binding upon a later generation.[200] Indeed, statutes and practices which have fallen into disuse or have been continually ignored are said to have fallen obsolete through the doctrine of desuetude.[201] Just as these enactments or proposals lapse when continually ignored, so could a court hold the Madison amendment to have been "waived."[202] By the *Coleman* analysis, the proposal would no longer be "*fully* responsive to the conception which inspired it."[203]

The Constitution's implicit requirements are as much a part of the text as its explicit provisions.[204] The amendment process set forth in the text of Article V demands a clear consensus at the time of ratification in order to amend the Constitution. It is clear that the Madison amendment has failed to comply with the contemporaneous consensus requirement and was therefore ratified unconstitutionally.

### *B. Answering the "Political Question"*

Under *Coleman*'s grant of plenary authority to Congress, the federal judiciary would not be able to review even an unconstitutional ratification procedure because the amendment process constitutes a nonjusticiable political question. However, the *Coleman* rationale for granting Congress unreviewable authority was not valid. In abstaining from a decision on the merits, the *Coleman* Court ignored a long line of established precedent. As the political question doctrine has evolved, it is no longer likely that the federal courts would agree that the amendment process is nonjusticiable. A federal court should, therefore, be free to declare the Madison amendment unconstitutional.

#### *1.* Coleman *was a break with established precedent*

The *Coleman* Court held that the Supreme Court should not decide either the issue of timeliness or any other amendment process issues.[205] The Court stated that the amendment process invariably involved nonjusticiable political questions.[206] In so deciding, however, "the Court ignored a rich history of judicial review of amendment process issues."[207] *Coleman* contradicted over a cen-

200. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

201. For a definition of this legal doctrine, see *supra* note 124.

202. Dellinger, *supra* note 10, at 425 ("A court troubled by the existence of amendments proposed over a hundred years ago could invoke a doctrine of desuetude and declare the amendments dead.").

203. Coleman v. Miller, 307 U.S. 433, 453 (1939) (emphasis added).

204. *Dillon*, 256 U.S. at 375.

205. *Coleman*, 307 U.S. 433.

206. *Id.*

207. Dellinger, *supra* note 10, at 403.

tury's worth of caselaw promoting an active judicial role in the amendment process.[208] Curiously, the Court did not give any reason for diverging from these established precedents.

The *Coleman* Court held that there were no recognizable "criteria for . . . judicial determination" of the timeliness issue.[209] In holding that the Court lacked judicially manageable standards by which to make its decision,[210] the Court ignored the concept of judicial review and numerous Supreme Court cases deciding amendment process issues.[211] The Supreme Court's review of the amendment process is even older than the concept of judicial review itself.[212]

Beginning in 1798, in *Hollingsworth v. Virginia*,[213] which held that the President's approval was not required in ratifying the Eleventh Amendment, the Supreme Court fulfilled its duty as the final authority on constitutional interpretation and decided Article V cases on their merits. Continuing through 1931 with *United States v. Sprague*,[214] in which the Court held that Congress could freely determine the mode of ratification, the Supreme Court consistently decided cases involving the amendment process and questions of timeliness.[215] The political question doctrine was not injected into

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208. Clark, *supra* note 114, at 645-46.

209. Coleman v. Miller, 307 U.S. 433, 453 (1939). Most members of the 102d Congress seemed to agree with the *Coleman* plurality, that Congress' discretion in this matter is somewhat akin to papal infallibility. See *supra* note 62 for a list of comments offered by members of Congress regarding the Madison amendment. However, a large number of current legal commentators have disagreed with the opinion of the *Coleman* "majority" that the amendment process is a nonjusticiable political question. *See, e.g.*, Dellinger, *supra* note 10, at 389-405; Dow, *supra* note 167, at 31 n.149; Rees, *supra* note 152, at 908-17. Each challenges the reasoning and validity of the *Coleman* decision.

210. *Supra* note 151 and accompanying text. *Cf.* Clark, *supra* note 114, at 648. Professor Clark asserted that this argument was not valid since

> the equally serious difficulty in applying standards based on complex facts in determining the constitutionality of statutes has never prevented the Court from taking jurisdiction of cases arising under the Fourteenth Amendment. The issues of fact in those cases are often much more complex than the question whether a reasonable time has elapsed since the proposal of an amendment.

*Id.* (footnotes omitted). Professor Clark goes on to suggest that the Court could take judicial notice of the facts in an amendment process case or merely require briefs which set out the relevant factual information. *Id.* at 648-49.

211. *See* Elder, *supra* note 169, at 64-73 (discussing seven previous decisions of the Supreme Court which assumed justiciability of amendment process issues without any discussion of its inability to decide such matters).

212. Dellinger, *supra* note 10, at 403.

213. 6 U.S. (3 Dall.) 378 (1798).

214. 282 U.S. 716 (1931).

215. *See, e.g.*, Dillon v. Gloss, 256 U.S. 368 (1921) (holding that Congress' provision of seven year ratification period for the Eighteenth Amendment was proper under Article V); *see* cases cited *supra* note 104.

amendment process adjudicature[216] until the *Coleman* Court unilaterally chose to do so.[217] Later cases underscore the fallacy of the *Coleman* rationale.[218] The courts are quite capable of setting coherent standards and deciding complex factual issues which may have far-reaching "political" effects.[219]

Indeed, the *Coleman* holding seems to contradict Chief Justice Marshall's explanation of the Court's duty to "say what the law is."[220] As stated in *Marbury v. Madison*,[221] it is the responsibility of the Supreme Court to act as the ultimate interpreter of the Constitution.[222] Whatever the difficulties involved in determining the reasonableness of a ratification period, the courts are nonetheless bound to decide these matters "in the final instance."[223] This duty is especially clear where a case "turns on the proper interpretation of the relevant constitutional provisions."[224]

Certainly, the federal judiciary is more than competent enough to set standards by which it can decide amendment issues such as timeliness.[225] The courts are much better suited than Congress to make dispassionate decisions according to fixed, certain standards.[226] As Justice Joseph Story stated in his constitutional treatise criticizing legislative decision-making, granting complete control to the legislative branch would not serve the interest of having a clear and certain amendment process:

> Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous . . . . If [a legislature] feels no check but its own will, it rarely has

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216. Rees, *supra* note 152, at 909.

217. *See supra* text accompanying note 158 (stating that neither party in *Coleman* argued that the case involved a nonjusticiable political question).

218. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (deciding complex question of legislative reapportionment); *see also infra* notes 243-67 and accompanying text (discussing later "political question" cases).

219. *See* Dellinger, *supra* note 10, at 416-17 (stating that, in deciding past amendment process cases, "the Court proved quite capable of resolving issues arising under Article V"). The Supreme Court has stated that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications. . . ." INS v. Chadha, 462 U.S. 919, 943 (1983).

220. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

221. 5 U.S. (1 Cranch) 137 (1803).

222. *Id.* at 177-78.

223. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting).

224. United States Dep't of Commerce v. Montana, 112 S. Ct. 1415, 1416 (1992) (holding that the constitutionality of congressional redistricting was not a nonjusticiable political question).

225. "If orderly procedure is essential in the enactment of ordinary statutes, should it not be even more so as to the adoption of important and permanent constitutional amendments?" Rees, *supra* note 152, at 915 n.122 (quoting LESTER B. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 21 (1942)).

226. Dellinger, *supra* note 10, at 417; Rees, *supra* note 152, at 914-18.

> the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations to society.[227]

Furthermore, inherent restraints on a court's decision-making ability do not favor abdicating congressional authority, but rather highlight the advantages of judicial resolution of amendment process disputes.[228]

### 2. *Unreviewable congressional power over the amendment process has no basis in the Constitution*

The four concurring Justices in *Coleman* found that authority over the issue of timeliness and all other aspects of the amendment process was given to Congress by the text of the Constitution.[229] It is clear from the text, however, that the legislative supremacy granted by the *Coleman* Court is not warranted. The provisions of Article V merely grant power to Congress in *proposing* amendments.[230] It does not follow that, from this grant, Congress is to be the final arbiter on questions as to whether or not Article V has been followed.[231] Indeed, such a delegation of constitutional interpretation would confirm the fears of the Framers that power over such a basic constitutional right as that of amendment might be concentrated in one branch of government.[232] This is especially true when the amendment purports to limit the authority of that branch of government or when that branch cannot freely decide because of external political pressures.[233]

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227. INS v. Chadha, 462 U.S. 919, 949 (1983) (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383-84 (1858)). *See also* Dellinger, *supra* note 10, at 392-93 (asserting that congressional decisions "would almost surely fail to produce usable precedents").

228. Dellinger, *supra* note 10, at 413. Professor Dellinger argues that

> the requirement of written opinions justifying results reached, the doctrine of stare decisis, and the judiciary's relative disinterestedness in the ebb and flow of momentary public opinion all tend to give the courts an institutional advantage in establishing and applying fundamental norms.

*Id.* (footnote omitted).

229. Coleman v. Miller, 307 U.S. 433, 457 (1939) (Black, J., concurring).

230. U.S. CONST. art. V.

231. Clark, *supra* note 114, at 645-46.

232. Elihu Root expressed those fears: "It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined." Rees, *supra* note 152, at 917 (citing Walter F. Dodd, *Amending the Federal Constitution*, 30 YALE L. J. 321, 323 (1921)).

233. Justice Powell, in his concurrence in Goldwater v. Carter, 444 U.S. 996, 997-1002 (1979), suggested that a branch of government should not decide cases involving a constitutional process which is used to override that branch's authority. In *Coleman*, Justice Powell noted that the disputed Child Labor Amendment had been introduced to overrule the Supreme Court's decisions in Hammer v. Dagenhart, 247 U.S. 251 (1918), and Child Labor Tax Case, 259 U.S.

The resolutions through which both Houses of Congress voted to support the ratification of the Madison amendment did not specify that the reasonableness standard had been met.[234] Not even those members of the 102d Congress most staunchly in favor of the Madison amendment would go so far as to assert such a wild proposition.[235] Many members of the 102d Congress seem to have considered their approval of the ratification of the Madison amendment to have been an "exception" to the reasonable time requirement.[236]

If Congress can declare an exception to such a historically acknowledged constitutional requirement as contemporaneous consensus, there can be little doubt that Congress could also declare that an amendment has been validly ratified when it was approved by only thirty states or otherwise disregard constitutional provisions.[237] Such possibilities cry out for judicial review instead of leaving the final decision to a "highly politicized, ad hoc judgment by the Congress sitting at the time. . . ."[238] The courts are infinitely better suited to decide such matters of traditional constitutional

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20 (1922). *Goldwater*, 444 U.S. at 1001 n.2. In such cases, "it may be entirely appropriate for the Judicial Branch of Government to step aside." *Id.*

*Goldwater* did not involve such a conflict and neither would a dispute over the constitutionality of the Madison pay-raise amendment. Although the amendment purports to *limit* Congress' own authority, it cannot be argued that Congress is therefore the best judge of the amendment's validity. The judgment of a political branch of government in deciding the constitutionality of its own powers according to textual provisions will necessarily be impaired by political considerations. In the case of the Madison amendment, a congressional rejection of the pay-raise limitation on any grounds would have caused a tremendous political uproar. It is arguable that Congress, considering the political price, had no choice at all in this matter.

234. *See, e.g.*, S. Con. Res. 120, 102d Cong., 1st Sess., 138 CONG. REC. S6908 (daily ed. May 19, 1992) (stating that the amendment "has become valid, to all intents and purposes, as a part of the Constitution of the United States, and shall be known as the twenty-seventh amendment").

235. Senator Grassley came closer than any of his colleagues. *See* 138 CONG. REC. S6940 (daily ed. May 20, 1992). He stated that "I believe . . . the Senate is acting to go on record in support of the timeliness of this ratification." *Id.*

236. Representative Edwards apparently believed this to be the case, *see* 138 CONG. REC. H3397 (daily ed. May 19, 1992) ("[I]t should be clear that this is an exception, not a precedent."), as did Senator Byrd, who co-sponsored the Senate resolution:

> In most circumstances, I believe that a lapse of this length would be too great to sustain ratification. . . . I believe that for the case of this amendment the purposes normally served by contemporaneous action have been fully served by the widespread, indeed almost universal, support for this amendment and the lack of any change in relevant conditions.

138 CONG. REC. S6830 (daily ed. May 19, 1992).

237. *Cf.* Elder, *supra* note 169, at 84 ("An interpretation of constitutional law is involved for which the Court is eminently suited, and neither the Congress nor the Executive would be competent to decide its own case."); see also Tribe, *infra* note 280 regarding Congress' declaration that thirty-five ratifications could be sufficient to validly amend the Constitution.

238. Dellinger, *supra* note 10, at 389.

interpretation.[239]

### *3. Development of the political question doctrine*

According to the political question doctrine as it has evolved since 1939, complete judicial deference to decisions of Congress concerning amendments is "unwarranted and unwise."[240] Judicial capacity for resolving complex cases and cases involving congressional powers has proven quite satisfactory.[241] The current Supreme Court might also have trouble accepting the *Coleman* rationale for abstaining from amendment issues such as timeliness.[242]

The Supreme Court's decisions in *Baker v. Carr*[243] and *Powell v. McCormack*[244] have virtually destroyed whatever force *Coleman* might have had as precedent in a political question case.[245] *Baker* is the modern formulation of the political question doctrine.[246] According to it, there are three basic inquiries:[247] first, whether the decision is demonstrably committed by the text of the Constitution to another branch of government;[248] second, whether resolution of this issue requires "that a court move beyond areas of judicial expertise;"[249] and third, whether considerations of respect for the authority of other branches counsel against judicial resolution.[250]

The *Baker* Court found no such impediments to judicial resolution of a complex dispute over legislative reapportionment.[251] Nor did the Court choose to abstain from deciding the merits of *Powell*. In *Powell*, the issue concerned a constitutional provision granting Congress the power to "be the Judge of the Qualifications of its own

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239. *Supra* note 237.

240. Dellinger, *supra* note 10, at 387 (describing *Coleman*'s rendering of the amendment process as "disastrous").

241. *Id.*

242. Professor Rees has suggested that the *Coleman* Court's reluctance to become involved in any matters of procedure within the amending process was at least the partial result of its own fears of compromising its legitimacy in the years following President Franklin D. Roosevelt's court-packing schemes. *See* Rees, *supra* note 152, at 913-14.

243. 369 U.S. 186 (1962).

244. 395 U.S. 486 (1969).

245. Elder, *supra* note 169, at 95.

246. Only the basic analytical framework of *Baker* is used herein. A full exposition of the political question doctrine is beyond the scope of this Note. For detailed analyses, see generally Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976), and Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

247. This articulation of the *Baker* holding is taken from Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

248. *Id.*

249. *Id.*

250. *Id.* at 998, 1000.

251. Baker v. Carr, 369 U.S. at 186, 217 (1962).

Members. . . ."[252] Despite this clearly demonstrable textual commitment of authority to Congress, the *Powell* Court held that the case was justiciable because the term "Qualifications" involved "interpretation of the Constitution . . . [which] falls within the traditional role accorded courts to interpret the law."[253] *Powell*[254] seems to stand for the proposition that, even where the Constitution grants decision-making powers to the legislative branch, courts may nonetheless "review a claim that Congress has exceeded [that authority]."[255]

At least two Justices on today's Court have already decided cases involving *Coleman* and the federal amending process. In neither of these cases was *Coleman* found to be dispositive. Chief Justice Rehnquist, sitting as Circuit Justice in 1984, decided *Uhler v. AFL-CIO*,[256] involving a California referendum which called upon Congress to call a constitutional convention. The California Supreme Court decision below had declared the legislative initiative unconstitutional as violative of Article V.[257] Denying the applicant's motion to overturn the decision based on *Coleman*, the Chief Justice stated, "I do not think a majority [of the current Court] would subscribe to applicants' expansive reading of the 'political question' doctrine in connection with the amending process."[258] Rehnquist emphasized that the *Coleman* decision was not made by a majority of the Court.[259]

Then-Judge Stevens, before being named to the Supreme Court, wrote the 1975 district court opinion in *Dyer v. Blair*.[260] The case arose out of a dispute regarding an Illinois constitutional requirement that three-fifths of the Legislature must approve a federal amendment in order to ratify it.[261] In deciding that the issue of whether Illinois had properly ratified the Equal Rights Amendment was justiciable, Judge Stevens held that the political question doctrine did not bar interpretation of the term "ratification" as used in Article V.[262] Although the district court stated that *Coleman*

252. U.S. CONST. art I, § 5, cl. 1.

253. Powell v. McCormack, 395 U.S. 486, 548 (1969).

254. It is worth noting that Justice Black, author of the plurality opinion in *Coleman*, joined the majority in *Powell*. Rees, *supra* note 152, at 920.

255. Nixon v. United States, 938 F.2d 239, 255 (D.C. Cir. 1991) (Edwards, J., dissenting) (arguing that the Senate's exercise of its "sole Power to try all Impeachments" was reviewable by the judiciary), *aff'd*, 113 S. Ct. 732 (1993).

256. 468 U.S. 1310 (Rehnquist, Circuit Justice 1984).

257. AFL-CIO v. Eu, 36 Cal. 3d 687 (1984).

258. Uhler v. AFL-CIO, 468 U.S. 1310, 1312 (Rehnquist, Circuit Justice 1984).

259. *Id.*

260. 390 F. Supp. 1291 (N.D. Ill. 1975).

261. *Id.* at 1294-95.

262. *Id.* at 1302-03. Judge Stevens further stated that issues of "law" such as the effect of rescinded or dilatory ratifications may be decided by the courts. *Id.*

might be controlling on some issues of timeliness, Judge Stevens' opinion also cited *Dillon* on that issue with approval.[263] The court held that the text of Article V in this case "must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making."[264]

The Supreme Court recently decided a case involving the impeachment powers of the Senate, in which the political question doctrine was at issue. In *Nixon v. United States*,[265] the Court held that the Constitution[266] grants to the Senate exclusive discretion over impeachment procedures, thus precluding judicial review.[267] Nevertheless, it seems that the political question doctrine has been substantially weakened in the last several decades. Since the *Baker* decision in 1962, the Supreme Court has rejected arguments of nonjusticiability based on the doctrine in over a dozen cases.[268] It seems unlikely that a court would seek to avoid its constitutional duty of interpretation on the basis of this narrow and "rarely invoked limitation on judicial authority."[269] As the *Baker* Court warned, the political question doctrine should be used solely as a "tool" to promote separation of governmental powers; it should never "be so applied as to promote only disorder."[270]

### *4. Declaring the Madison amendment unconstitutional*

In analyzing the Madison amendment according to the *Baker* framework, the political question doctrine does not seem to operate as a bar to a judicial decision on the merits. First, the textual commitment to Congress of discretion in proposing amendments and choosing the mode of ratification implies nothing about the power of Congress to review the ratification procedure *after* it has been chosen. Any controversy over whether Article V's amendment procedure has been properly followed would necessarily require interpretation of the term "three fourths of the Several States" and the

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at 1301 n.24; *but see id.* (stating that timeliness issues may also involve unreviewable questions of fact).

263. *Id.*

264. *Id.* at 1303.

265. 113 S. Ct. 732 (1993).

266. U.S. CONST. art. I, § 3, cl. 6 (providing that the "Senate shall have the sole Power to try all Impeachments"). A clearer textual commitment is difficult to imagine, as opposed to Article V's limited and vague suggestion of congressional power over the amendment process.

267. Nixon v. United States, 113 S. Ct. 732, 734 (1993).

268. *See* Nixon v. United States, 938 F.2d 239, 258 n.11 (D.C. Cir. 1991) (Edwards, J., dissenting) and cases cited therein.

269. *Id.* at 253.

270. Nixon v. United States, 113 S. Ct. 732, 748 (1993) (Souter, J., concurring) (quoting Baker v. Carr, 369 U.S. 186, 215 (1962)).

ambiguous phrase "when ratified,"[271] a task traditionally within the purview of the courts. The *Powell* Court reached a decision on the merits in spite of a much clearer commitment of plenary authority to Congress.[272] A court need only determine what powers Congress may possess under Article V and whether or not it has exceeded those powers. Furthermore, the Article V requirement of supermajorities in the amendment process clearly supports a conclusion that the addition of present ratification votes to the losing votes of six states over a century ago do not fairly express the existence of a current consensus in constitutional terms.

Second, a decision of this nature would not involve determinations which extend beyond areas of "judicial expertise." The facts surrounding the ratification of the Madison amendment are clear.[273] A court deciding the constitutionality of this amendment's two hundred year journey toward ratification need only decide the question of reasonableness according to the Constitution. In light of the relatively brief ratification periods required for the Constitution's first twenty-six amendments[274] and Congress' repeated insertion of seven- and ten-year ratification deadlines into its amendment proposals, a court could easily find that two centuries is an unreasonable time for an amendment to gain approval.

Finally, the degrees of respect and judicial deference to be given to coordinate branches of government extend only so far as those branches legitimately exercise their constitutional powers.

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271. U.S. CONST. art. V.

272. The *Nixon* Court declared nonjusticiable the clearest delegation to the Senate of complete and sole authority over the impeachment powers: "the Senate shall have the *sole* Power to try *all* Impeachments." U.S. CONST. art. I, § 3, cl. 6 (emphasis added). The *Nixon* Court was clearly conscious of the inherent conflict of interest involved in any judicial review of a judicial impeachment. Nixon v. United States, 113 S. Ct. 732, 739 (1993) ("Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.").

273. These facts are set out in exhaustive detail in BERNSTEIN WITH AGEL, *supra* note 2, at 243-56 (1993) and Bernstein, *supra* note 26, at 497. Also, any fact-finding required beyond mere textual interpretation could easily be conducted by a court or stipulated in briefs of counsel, as has been done in innumerable prior cases involving complex questions of fact and mixed questions of law and fact. Such a determination is readily within the capacity of the federal judiciary. *See* David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 543-44 (1991) (discussing various areas of judicial fact-finding, including "contemporary values"); ABRAHAM L. DAVIS, THE UNITED STATES SUPREME COURT AND THE USES OF SOCIAL SCIENCE DATA 75-94 (1973) (describing judicial decision-making processes in a wide variety of complex factual cases).

274. The first seventeen amendments to the Constitution were all ratified in less than four years. *Supra* text accompanying note 90. "[O]f the last eight amendments, the longest period was three years, eleven months for the twenty-second amendment and the shortest was four months for the twenty-sixth amendment." Ginsburg, *supra* note 165, at 921 n.13.

Indeed, it is the duty of the judiciary to determine the extent of such powers and decide whether they have been executed constitutionally. "Interpretation of the Constitution does not imply lack of respect for a coordinate branch."[275] The judicial power extends to all cases and controversies arising under the Constitution, including those which implicate congressional authority. Rather than warranting abstention, the doctrine of separation of powers instead highlights the need for judicial review, especially where complete congressional control would otherwise be maintained over a right as fundamental as that of amendment.[276] Moreover, the courts are more impartial arbiters of such a dispute because judicial powers are in no way affected by the ratification of the Madison amendment.[277]

The most logical and formalistic solution to this problem would be for the Court to invalidate all forty-one state "ratifications" approving the amendment over the past two centuries. Such a harsh result, however, seems undemocratic, especially in light of the thirty-five ratifications since 1978. Indeed Article V's strict requirements indicate that consensus is the ultimate goal to be achieved by the amendment process. Therefore, a solution should be sought which would show respect to those states which ratified the amendment within the last decade and a half yet release the imprimatur of those states which approved the proposal many generations ago.

In this regard, the best solution[278] would be to resubmit the

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275. Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Powell, J., concurring).

276. *See* THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (B. Wright ed., 1961). Hamilton seemed to support judicial review of congressional actions:

> If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption . . . . It is far more rational to suppose, that the courts were designed . . . to keep the [Congress] within the limits assigned to their authority.

*Id.*

277. *Cf.* 138 CONG. REC. S6950 (daily ed. May 20, 1992) (statement of Sen. Roth). Senator Roth urged his colleagues to consider the results of their action in favor of ratifying the Madison amendment:

> If a proposed amendment need not be ratified by the requisite number of States contemporaneously, a fact we now declare by these resolutions, then why cannot the States ratify other long-forgotten amendments? Then why cannot the States ratify even the expired amendments—those which failed ratification before a congressionally imposed deadline—in the hope that Congress would later extend the deadline?

*Id.* Despite such conscientious sentiment, in the end, Senator Roth likely considered his political viability and joined his Senate colleagues in the unanimous vote declaring the Madison amendment ratified. *See supra* note 7. For an argument that Congress lacks "political incentive and institutional capacity" to exercise considered and meaningful judgment on the constitutionality of those measures it may vote upon, see Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

278. Drawing "bright lines" within which to decide timeliness disputes is inherently difficult. James G. Wilson, *The Morality of Formalism*, 33 U.C.L.A. L.

amendment to those six states which ratified the amendment more than one hundred years ago and have not since re-ratified. This has been suggested by Representative Edwards of California, who argued that these states "should be urged to promptly vote again, so that any doubts regarding their approval today would be removed."[279] Professor Tribe has pointed out the supposed illogic of this remedy, arguing that these states would only be ratifying "[a] dead amendment that Congress has not reproposed."[280]

However, such a measure would ensure that ratification sufficiently "reflect[s] the will of the people in all sections at relatively the same period."[281] If the amendment does possess the overwhelming approval of today's residents of those states, as many have asserted, such a re-ratification would not be a difficult or time-consuming task.[282] If it does not, the amendment has not been ratified at all and must be reintroduced by Congress.[283]

There is clearly a need for a definitive judicial pronouncement in this area of the Constitution. As it currently stands, the process of amending our Constitution is controlled almost exclusively by Congress. Not only can Congress determine the procedure to be employed,[284] but it can also set a time limit for amendments[285] and

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REV. 431, 453-56 (1985). A solution seems best which can distinguish substantive and procedural analyses, thereby avoiding dangers of judicial encroachment into matters of policy. *Cf. id.* (comparing Dellinger's somewhat expansive model of judicial review of the amendment process with Tribe's approach of limiting the judiciary to the "outer boundaries").

279. 138 CONG. REC. H3090 (daily ed. May 11, 1992) (statement of Rep. Edwards).

280. Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15. Professor Tribe has also argued that *Coleman*'s supposed grant of plenary authority to Congress is "a straw man if ever there was one." Tribe, *supra* note 16, at 433. In reference to the failed Equal Rights Amendment, Tribe rhetorically inquired:

> Could anyone believe, for example, that a court would feel bound to treat [the ERA] as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the "three fourths" of fifty required by article V? . . . Could anyone believe that a court would — or should — respect such a decision?

*Id.* Apparently, the 102d Congress would believe it.

281. Dillon v. Gloss, 256 U.S. 368, 375 (1921).

282. "If there is true sentiment for the proposed amendment, no short-cut is needed." Vile, *supra* note 6, at 16.

283. When the Madison proposal was voted upon by the states between 1789 and 1791, the measure was defeated and therefore no longer before the states. It is imaginable that the amendment could be viewed as having been "constructively" reproposed in 1978 when Wyoming resurrected it. See *supra* notes 46-49 and accompanying text for Wyoming's ratification. Even this tortured construction, however, could not save the six ratifications which occurred over a century ago and were not re-ratified in the 20th Century. See *supra* note 30 regarding North Carolina's 1989 re-ratification.

284. U.S. CONST. art. V.

285. *Dillon*, 256 U.S. at 375-76.

then decide whether that amount of time is reasonable.[286] Consequently, in recent years Congress has extended the period in which an amendment could be ratified[287] and, with its acceptance of the Twenty-seventh Amendment, made an exception to the constitutional requirement of contemporaneous consensus.[288] Merely because the Madison amendment constrains Congress does not mean that an exception should be made to the express and implied provisions of Article V. If the circumstances of the Madison amendment are to be considered as representative of a valid amendment process, the power to amend the Constitution surely belongs exclusively to five hundred thirty-five members of Congress.

## CONCLUSION

A state's ratification of a proposed amendment to the Constitution is not a "sacramental act," valid for all time so long as Congress agrees with it.[289] Once Congress has proposed an amendment, it has no role in the amendment process.[290] To give the legislative branch the exclusive power to decide the validity of an amendment which materially affects every member of Congress clearly contradicts the doctrine of separation of powers and the dictates of Article V. Moreover, it presents a profound conflict of interest which judicial review should serve to eliminate. Instead, by approving a minimal restriction on the power to raise their pay,[291] Congress members have surreptitiously expanded their powers with respect to the amendment process.

If the extraordinary ratification of the Twenty-seventh Amendment is to be considered valid, then the amendment process has become whatever Congress says it is. However, the profound importance of the manner in which our basic charter of government is fundamentally and permanently altered demands that there be more certainty to its procedure than to leave it to the whims of a

286. Coleman v. Miller, 307 U.S. 433, 454 (1939).

287. The Equal Rights Amendment was proposed with a seven-year limitation on its ratification. At the end of that period, thirty-five states had ratified the measure, three short of the constitutional requirement. Congress voted to extend the period by three years and three months. Dellinger, *supra* note 10, at 393 (citing H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978)).

288. See *supra* note 236 for the "exception" view among members of Congress regarding the Madison amendment's timeliness. When Congress acquiesced to the validity of the Twenty-seventh Amendment without holding hearings, Professor Gerald Gunther was moved to declare, "The backbone of members of Congress is composed of bananas." DeBenedictis, *supra* note 11.

289. Rees, *supra* note 15, at 881 n.21.

290. *See* Dellinger, *supra* note 16, at 389-405 (arguing that *Coleman*'s creation of congressional promulgation of amendments upon ratification by the thirty-eighth state is "unwise" and "dysfunctional").

291. Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992) (holding that the amendment does not prevent annual cost-of-living adjustments).

particular session of Congress.[292] Therefore, the letter and spirit of Article V should be strictly adhered to, and the judiciary should have the final say in determining whether this has been done.

In the case of the Madison amendment, a process which takes more than two centuries to complete is clearly violative of the Constitution's insistence on obtaining a clear and timely consensus in order to change our fundamental law. Rather than depend on the political foibles of Congress to make this determination, a court should declare the ratification of the Twenty-seventh Amendment to have been outside the parameters of Article V of the Constitution. In order to bring the amendment within the constitutional requirement of contemporaneous consensus, the federal judiciary should compel Congress to resubmit the amendment to the states—or at least send it back to the six states which ratified it prior to the twentieth century without subsequently re-ratifying.[293] Without a decisive judicial pronouncement on the unconstitutionality of the Twenty-seventh Amendment, we may one day find that the "popularity hunters"[294] of the 102d Congress, in waging a "holy war" on salary increases,[295] inflicted more damage upon the amendment process than upon their wallets.

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292. This is especially so when the proposed alteration directly affects the interests of each member of Congress. Representative Neal Smith of Iowa derided the 102d Congress' hasty approval of the Madison amendment as "short-term political pandering without regard to long-term consequences to the Constitution." BERNSTEIN WITH AGEL, *supra* note 2, at 247 (citing J. Jennings Moss, *House, Senate OK Amendment*, WASH. TIMES, May 21, 1992, at A3).

The 102d Congress' declaration of the amendment as a valid part of the Constitution also runs contrary to prior congressional action (or inaction) concerning the viability of the Madison amendment. In at least four instances, prior sessions of Congress have had the opportunity to reintroduce the Madison amendment or declare it to be pending or otherwise before the states. Yet, in each of these situations, Congress indicated that the Madison proposal died long ago. In 1816, 1822, and 1873, when numerous pay-raise amendments were proposed, no member of Congress even alluded to the Madison proposal, much less attempted to bring about its ratification by states in addition to those six who ratified it in the 18th Century. *See supra* notes 34, 38, and 44. As recently as 1972, Congress indicated that the Madison amendment "failed of ratification." S. DOC. NO. 82, 92d Cong., 2d Sess. 26 n.2 (1972). The Senate document also listed the amendment among "Proposed Amendments Not Ratified By the States." *Id.* at 49-50. More significantly, the Madison amendment was *not* listed under the subtitle, "Proposed Amendment Pending Before the States." *Id.* at 45-47 (listing only the Equal Rights Amendment).

293. *See supra* notes 30, 40-44 and accompanying text; 1 ELLIOT'S DEBATES, *supra* note 8, at 340; *see also supra* note 30 (concerning the solitary re-ratification of the amendment).

294. 38 ANNALS OF CONG., 1717 (1822) (statement of Rep. Robert Wright of Maryland, protesting the desire of some members of the 17th Congress to prevent their colleagues from being "decently compensated").

295. *Id.* at 1704 (statement of Rep. Benjamin Hardin of Kentucky).